[2013] JMSC Civ 95

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

Claim NO. 2007 HCV 02271

BETWEEN	**Calvin Cameron**	**Claimant**
AND	**Security Administrators Ltd.**	**Defendant**

John Bassie along with Deniece Aiken , instructed by John Bassie and Co. for the Claimant.

Miguel Palmer and Miguel Williams, instructed by Livingston, Alexander and Levy, for the Defendant.

Heard : June 24, 25 and 26, 2013

UNFAIR DISMISSAL – WRONGFUL DISMISSAL – PAYMENT OF NOTICE PAY IN LIEW OF NOTICE – FAILURE TO AFFORD A FAIR HEARING – DISMISSAL FROM EMPLOYMENT FOR ALLEGED SUFFICIENT CAUSE.

ANDERSON, K., J.

Judgment of Court:

[1] The claimant is a former employee of the defendant and in that regard was employed by the defendant, between the years October 1987 and July 26, 2006, in the capacity of senior security co-ordinator. In that capacity, he reported to the managing director - Mr John Ulett. On July 26, 2006, his employment services with the defendant

were terminated and arising from that termination, he has, by means of this claim, claimed damages, or in other words, compensation for that which he claims, was his unfair dismissal from employment with the defendant.

[2] In Jamaica, a claim for unfair dismissal, can only be pursued by means of the statutory provisions as contained in **Jamaica's Labour Relations and Industrial Disputes Act**. The provisions in that Act, used to permit only a claim by a unionised employee to be brought before the Industrial Disputes Tribunal, seeking appropriate relief arising from a former employee's unfair dismissal. The law in that regard was changed however, as of March 22, 2010. In Act No. 8. of 2010, it was, in essence, provided for, that even a non-unionised former employee, could, pursuant to the provisions of that Act, seek relief arising from his or her, unfair dismissal. The case of **Village Resorts Limited v Industrial Disputes Tribunal**- Supreme Court Civil Appeal No. 66 of 97, has made it abundantly clear, that matters of unjustifiable, or in other words, unfair dismissal, are to be addressed, utilising the provisions of the Labour Relations and Industrial Disputes Act. It was the claimant's counsel – Mr. Williams' submission as made during his oral closing arguments before this court, that since the 2010 amendment to the **Labour Relations and Industrial Disputes Act** was not in effect when the cause of action for the claimant arose, this court should allow for a remedy to be provided arising from the claim for unfair dismissal. If this court were to do that, it would be tantamount to legislating, which is not and ought never to be, the role of this court. The common law provides remedies for the dismissal of a person from employment, in breach of contract. Such remedies will be granted, most typically, on a claim for damages for wrongful dismissal. The failure of the claimant to claim any relief for wrongful dismissal however, does not mean that the claimant is without any legal recourse in the Claim at hand. This is because, **rule 8.7(1) (b) of the C.P.R**. provides that the claimant must in the claim form specify a remedy that the claimant seeks, though this does not limit the power of the court to grant any other remedy to which the claimant may be entitled. This court disagrees with the submission as made during the oral closing submissions which were presented to this court by Mr. Williams for the defendant, as regards that which the defendant has contended, is the inapplicability of **rule 8.7(1) (b) of the C.P.R.**, in a situation such as this. Mr. Williams

has, in that regard, on the defendant's behalf, contended that **rule 8.7 (1) (b) of the C.P.R**. cannot avail the claimant, since the claimant's cause of action cannot, in any respect, properly be pursued before this court. He has further contended that a remedy can only properly be granted by a court, if a valid cause of action has been pursued and proven in court. If that has been done, but as he has said, only if that has been done, can remedies not specifically claimed for by a claimant, be then properly granted by a court. This court does not accept as valid, Mr. Williams' contentions in that regard. This court does not so accept same, because of the wording of **rule 8.7 (1) (b) of the C.P.R**. which permits this court to grant, '*any other remedy to which the claimant may be entitled.*' If that rule of court were to be interpreted in the manner as the defence counsel have suggested, then such would have had to have been worded less widely than it has been, in that the said rule would have then had to have stated as follows – *'… this does not limit the court from granting any other remedy to which the claimant may be entitled, arising from the cause of action being pursued.'* This is not however what is specified in the relevant rule of court. Additionally, it must always be remembered that in interpreting Jamaica's rules of court, the primary consideration of this court, must always be, the, 'interests of justice' as that quoted term is defined in **rule 1.1 of the C.P.R**. It is this court's considered opinion that the interests of justice demand that where a cause of action exists from the claimant's statement of case, albeit that such cause of action is not the one claimed for, that if said case has reached as far as the stage of trial, then provided that the claimant can prove his case, in respect of the cause of action which exists on the claimant's statement of case, then, provided that such cause of action has been duly proven at trial, by evidence, the court should grant whatever remedy the claimant may be entitled, arising therefrom. To insist on otherwise, would be, at a trial, to place greater emphasis on form than substance. Although this Court has no jurisdiction, to award to the claimant, damages for unfair dismissal, this court may nonetheless, depending though of course, on what, if anything, on the evidence, this Court finds to have been proven to the requisite legal standard, award compensation to the claimant if it finds that he should, as a matter of law, be awarded same. When considered in that context, this Court has considered it appropriate to determine whether, based on the common law as it relates to

compensation for wrongful dismissal, the claimant would be entitled to such relief, arising from the claimant's statement of case, and what, if anything, this Court finds to have been proven in respect thereof.

[3] As far as the alleged unfair dismissal is concerned, I wish to state just a few things for the record. These comments are of course, only made in passing and therefore cannot bind properly be considered as legally binding on any one or on any other Tribunal. The claimant, having been dismissed from his employment with the defendant in 2006, would not be entitled to invoke in his favour, the provisions of a statute which, as amended, was passed into law in 2010, in order to claim relief. This is because, the 2010 amendment to the **Labour Relations and Industrial Disputes Act**, has no retrospective effect whatsoever. In order for the same to have had retrospective effect, the amending statute would have had to have expressly so provided. The amending statute has not so done.

[4] The claimant no doubt feels aggrieved by the actions of the defendant in relation to the termination of his employment. His employment was terminated by means of notice pay of eight weeks, in lieu of actual notice having been given as regards the termination of his employee services with the defendant. That termination was stated in a letter addressed to Mr. Cameron and dated July 26, 2006, under the hand of the then managing director of the defendant, namely, Captain John Ulett, to have been done in accordance with section 7b (ii) of Mr. Cameron's contract of employment with the defendant. That contract of employment for 2006 was never in fact signed to by the claimant. Nonetheless, the claimant did accept, while giving evidence, that for the year 2006 his contract of employment from 2005, which he had signed, was, according to him, renewed. He also accepted, whilst giving evidence under cross examination, that clause 7 of his 2005 contract of employment, provided that the defendant could terminate his contract of employment, if he were found guilty of any serious misconduct or serious breach, or non - observance of any of the rules and regulations of security. He further accepted, also during cross examination, that his 2005 contract, also says that the contract may be terminated by the giving to him by the defendant of notice in writing as per government guidelines attached to the contract. And that in accordance

therewith and bearing in mind that he had been working for between 15 and 19 years for the defendant, up until July 26, 2006, that he was to be given eight weeks notice for the termination of his contract of employment with the defendant. Clearly therefore, the claimant was employed under a contract of employment in 2006, with the defendant which would have once renewed, from as of January 1, 2006, contained the same terms as existed in the 2005 contract to which the claimant had expressly assented as he has truthfully , given evidence of.

[5] Clause 7b (ii) of the claimant's contract of employment with the defendant entitled the defendant to determine the agreement, or in other words, terminate its employment contract with the claimant, who, for the purposes of the agreement is described as 'THE CONTRACTOR,' if the contractor shall be guilty of any serious misconduct, or any serious breach, or any non-observance of any of the rules and regulations of security. It is clear from the evidence as presented to this Court on behalf of the defendant, that the defendant had, from some time before July 26, 2006, concluded that the claimant was guilty of such serious misconduct as referred to above. In that regard, the defendant's managing director, while giving evidence under cross examination, testified that essentially there were four allegations against the defendant and they were as follows:

i) That the claimant was made aware of four tyres, being cargo, which were on the Kingston wharves facility, this being a customs area under the laws of Jamaica and having been made aware by an employee named Hunt, had been given four tyres, which is cargo – this being an illegal act, to receive cargo as an employee at the wharf, Mr Cameron did nothing about it, despite being aware of that security breach.

ii) The second breach alleged against Mr Cameron was that he compounded the first breach, in that he requested and was given two tyres, which he was not authorized to receive and which Mr. Hunt was not authorized to give him .

iii) The third, is that he, Mr Cameron, engaged in making arrangements to remove those tyres from the Kingston wharves; and

iv) That Mr. Cameron engaged the services of other security officers to facilitate illegality number three. It is to be noted that no evidence has been led before this Court either through the defence's own witnesses, or even through cross examination of the claimant himself – he being the only witness called on his own behalf, as could, even on a balance of probabilities, serve to have proven that the claimant committed the alleged illegalities and breach of security rules and procedures as per numbers (iii) and (iv) of the allegations as set out above . There was however, evidence presented that this Court by Miss Charmaine Williams and indeed also, even by the claimant himself, while he was then undergoing cross – examination, which, if accepted by this Court, would serve to prove allegations numbers (i) and (ii) as set out above. As a matter of law however, it must be made clear, that even though it is the claimant who has brought this claim, nonetheless, insofar as a special defence has been raised by the defendant in its defence, that being that, in the alternative, the claimant was dismissed from his employment for sufficient cause, the burden of proof in respect of that special defence laid solely on the shoulders of the defendant. For other reasons which will be made clear in this judgment, a short while from now, whether the defendant has proven before this court, that the claimant committed such serious misconduct or not, is entirely irrelevant for the purpose of the legal issues to be addressed by this Court in respect of this claim. This is because the claimant had his employment services with the defendant terminated by means of notice pay, in lieu of notice, which was paid to him by the defendant, in accordance with the defendant's contract of employment with him.

[6] It does seem to this court though, that whilst the defendant, no doubt attempting in good faith, through its then managing director, namely, Captain John Ulett, to investigate the matter surrounding the allegations of serious security breaches and perhaps even breaches of the Laws of Jamaica, as made against the claimant, did so investigate, it is nonetheless, very clear, that prior to there having been any discussion with the claimant and either Mr. Ulett, or anyone else, on behalf of the defendant as regards any of the allegations made against the claimant by others, it had already been determined by the defendant's managing director and perhaps others, at least one of whom would be the defendant's then human resources manager, namely, Juliet Crawford, that the claimant was guilty as alleged, and therefore could not remain in the employ of the defendant, since, as a consequence thereof, the defendant had lost trust and confidence in the claimant. Life is strewn with numerous examples of situations in which persons fervently believe, based on all that they then know, that a particular situation is or is not so. Oftentimes , it is only after such persons have heard a different perspective on the issue which they then fervently believe as being either so, or not so, that their own perspective on that particular issue, will then, either change, or at least, cause them to question themselves as to their previously, fervently held beliefs. Thus for example, at one time in human history, it was believed by nearly everyone that the world was flat. The exploratory voyages of one Christopher Columbus in centuries past have now proven and indeed have proven ever since then, that that belief, although entirely understandable in the context in which it was then held by many of the most intelligent persons amongst which many were the best scientists of the time, is one which was entirely flawed. This underscores the importance of listening to someone who is accused of something, before judging him or her as being guilty of same. This is to be done not only, for the purpose of both being and appearing to be as fair as possible to the accused person, but also because, by listening to an accused person, before judging him or her to be guilty of something alleged against him or her, one may very well find and conclude that the person whom you thought may have been guilty, is not in fact guilty of anything whatsoever. This is why it is well known in law that to judge a person as guilty of, for instance, a crime, regardless of how heinous such crime may be, must inevitably, lead to a quashing of that judgment by the court once the matter is

brought for consideration, before another court at a later date. Inevitably, the adjudication or judgment on a matter prior to a fair hearing, could easily lead any court to conclude that such adjudication or judgment was fatally flawed from its onset, on the ground of bias. A fair hearing must necessitate giving the party against whom the allegations are made, a reasonable opportunity to respond to those allegations, including if necessary, the affording to him or her of the opportunity to consult perhaps with an attorney, or any other appropriate person and also, in most cases , to afford the person whose conduct is being impugned, sufficient time, within which to formulate an appropriate response. In most cases, where such a procedure is not followed, a court may very well conclude that the relevant employee's dismissal from employment was unfair, this even though the particular allegations against that employee, are such that they can and would likely easily be proven, perhaps even, beyond all doubt.

[7] As has been stated earlier on in this judgment however, a claim of unfair dismissal cannot be tried by this Court. For the purposes of the law as regards what constitutes wrongful dismissal, an alleged breach of a right to a fair hearing will be of no moment whatsoever, this because, parties must be free to contract with one another as also, subject to any contractually obligated compensation and/ or penalty which may arise therefrom, to terminate their contractual obligations with anyone. The law will never force parties to remain in contractual obligations to one another, if the parties do not freely choose to do so. This is why it was held by Jamaica's Court of Appeal, in: **Kaiser Bauxite Co. v Vincent Cadien** – [1983] 20 J.L.R. 168, that the concept of natural justice plays no role whatsoever in matters of private contractual relationships. This is also why, in claims for wrongful dismissal even if the claim is found to be proven, no award can be made for emotional distress or hurt feelings arising either from the manner of the dismissal, or from the dismissal having been wrongful. See: **Addis and Gramophone Co. Ltd.** (H.L.) – [1909] A.C. 489 , which was followed by Jamaica's Supreme Court, in the case: **Egerton Chang and National Housing Trust** – [1991] 28 J.L.R.495 .

[8] The Claimant's last signed contract with the defendant, which he said was renewed in 2006, is dated January 1, 2005. That contract was for a period of one year unless terminated in accordance with clause 7 thereof. If the claimant was wrongfully dismissed then, at best, he could recover no more than compensation for the five months and four days of services that were remaining, as at the date of his termination, these being for the months of July 27 - 30 and August to December 2006, in respect of the claimant's contract of services with the defendant. The claimant has, in this claim, sought to recover same. In addition, he had, originally sought, to recover compensation for sums due to him as vacation leave pay. That claim for vacation leave pay aspect of the claimant's larger claim though, has been settled and such was done prior to trial of this claim. In addition, the claimant is claiming the sum of over $9 million which he contends, represents compensation for unfair dismissal for eight years which in his counsel's opening address to this court, was made known to this Court, as being the period during which it would be expected to take in order for the claimant to be able to find a comparable job. In addition the claimant claims for three months retirement. The sum of over $9 million claimed, is thus, the compensation sought by the claimant, for eight years and three months' retirement. This Court has received no evidence from the claimant nor has it at all been set out anywhere in the claimant's statement of case, any information whatsoever, as to either his current age, or his age at the time of the termination of his employment with the defendant. Such information if available for this court to have used, would have been important for the purpose of determining, firstly, how long it would likely take for the claimant to obtain comparable fresh employment and equally importantly whether after another eight years post - July 2006, the claimant would have been able to have continued working, or would then be of retirement age. This Court has not been able to make either such determination solely from an assessment of the physical features and characteristics of the claimant. Additionally, no evidence has been led by the claimant and nowhere is it to be found in the claimant's statement of case, that it would likely take him eight years to obtain comparable new employment nor even that he has attempted, or intends to continue to attempt this assuming that he has begun to do so, to find such comparable new employment. The claimant has a duty to mitigate his losses. It seems clear to this Court, from the

evidence as presented before it, that the claimant has wholly failed, so to do. Quite rightly and understandably therefore, the claimant's attorney had, in his closing submission, informed this court that his client was no longer pursuing the aspect of the claim for damages of over $ 9 million. In any event though, the claimant would only have been entitled to recover, as damages for wrongful dismissal, at maximum, the sum of money which he would have been entitled to have been paid by the defendant if his contract of employment with the defendant had remained in effect until the end of December 2006 when it would have terminated in accordance with the renewed agreement between the parties, for the year 2006. This is the maximum sum that the claimant could have recovered, in a claim for damages for wrongful dismissal and he could only have recovered same, if his contract of employment with the defendant, had expressly provided, that if his contract were to be terminated, he would have to be paid salary in lieu of notice for the remaining contract term before expiration of said contract, or alternatively, be given notice of termination, equivalent to the period of months and or years, remaining on his fixed term contract , this of course, provided that such period of notice is not less than the statutorily required period of notice as are applicable, by virtue of the provisions of **Section 3 of the Employment (Termination and Redundancy Payments) Act**. In the case at hand, the claimant was provided by the defendant, in accordance with the statutory requirements of the **Employment (Termination and Redundancy Payments) Act**, with the requisite notice pay in lieu of notice, this being notice pay of eight weeks, as paid in lieu of notice and calculated based on the claimant's number of years of service as an employee of the defendant. In the case at hand, the claimant was paid eight weeks pay in lieu of notice, by the defendant, this in accordance with the terms of his contract of employment in particular, clause 7.1(c) thereof.

[9] Whilst it is true that the letter of dismissal as provided by the defendant to the claimant on July 26, 2006, specified therein that the termination was being done in accordance with clause 7.1 (b) (ii) thereof, nonetheless, the defendant was entitled to terminate the claimant's employment services with it, without assigning any reason whatsoever, if it wished, provided that it gave to the claimant, the requisite notice, or alternatively, payment in lieu of notice. If no notice pay had been paid to the claimant in

lieu of notice, then the issue of wrongful dismissal could be properly said, in law, as having arisen. That however, is not the case here. The defendant having given notice pay to the claimant in lieu of notice, for the eight weeks period as required by law and also by their contract of employment with the claimant, certainly did not wrongfully dismiss the claimant. See in this regard, that which was stated by Rowe, J.A., as he then was, in: **Fuller v Revere Jamaica Alumina Ltd. –** [1980] 31 W.I.R. 304, at pp. 309 J – 310 J. This is equally why it was held by Jamaica's Court of Appeal when comprised of three other justices, in the case: **Cocoa Industry Board and Cocoa Farmers Development Co. Ltd. and F.D. Shaw v Burchell Melbourne** – [1993] 30 J.L.R. 242, that payment in lieu of notice, in accordance with the terms of a contract of employment constitutes cogent evidence, that the relevant dismissal was not to be considered in law as being one for cause. See, in that regard, the dicta, as expressed by Justice of Appeal Wolfe, at page 246 D, of the court's judgment in that case. In determining whether a person has been summarily dismissed, which is of course, a question of law, a court should always look at the substance and give pre-eminence to same, over form. In other words, although the termination letter which was provided to the claimant by the defendant in July of 2006, had suggested very clearly, that the claimant was being dismissed from his employment with the defendant, for cause, with such cause being that he had allegedly committed serious breaches of security procedures, nonetheless, the claimant clearly was not, in substance, so dismissed, because if he had been so dismissed, then no notice pay would have been required. Indeed no notice whatsoever would have been required, because when a person who is employed by another, engages in conduct which is of a wrongful and/or, of an egregious nature, such employee is considered as having, as matter of law, chosen to terminate his own contract of services with his then employer. If such conduct is taken by the employer as having constituted a renunciation of the employee's employment contract with his employer, then his employer is entitled to treat with the same and dismiss the employee without notice. Such would not then be considered by a court as constituting a breach of contract by the employer, because, by the time when the dismissal of the employee without notice, thereafter takes place, the employee is viewed, in law, as having earlier renounced his contract of employment. This is why it will be for the Court

to consider in each case, whether a former employees conduct is to be taken as having constituted such a renunciation. This will often be a question of degree, depending on the particular nature of the conduct in question and the particular overall circumstances of each particular case. In the case at hand however, none of this is of any relevance, because upon his dismissal from employment with the defendant, the claimant was paid his requisite pay, in accordance with the terms of the law as well as, of his contract of employment. This is therefore not a case of the termination of the claimant's employment, for cause, without notice, as is permissible, in appropriate circumstances, as have been well established through the years, by means of case law and in accordance with the provisions of Section 3 (5) of the Employment (Termination and Redundancy Payments) Act.

[10] In the circumstances, this Court awards judgment to the defendant on the claimant's claim and the costs of the claim are to be taxed if not sooner agreed.

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Hon. K. Anderson, J.