



[2013] JMSC Civ 27

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2010/HCV 0827

BETWEEN

SILVINA DIXON

CLAIMANT

AND

EXECUTIVE MOTORS LTD.

DEFENDANT

Appearances

JohnS. Bassie instructed by JohnS. Bassie & Co. for the Claimant

Carol Davis for the Defendant.

**Employment-Dismissal summarily for abandoning job –
whether dismissal wrongful/unfair - measure of damages**

Heard: February 8, 2012 and February 28, 2013

P.A. Williams. J,

1. Silvina Dixon, the claimant, is an accountant by profession who was employed to Executive Motors Limited, the defendant, as an accounting officer.

Her employment commenced on the 3rd of January 2005 and she described her job as entailing her supervising the accounting department of three (3) persons, being in charge of all accounting functions, audit reports and preparing financial statements etc.

2. Her employment was terminated by way of a letter she received while at home on the 9th January 2009.

The letter stated inter alia:-

"We refer to your application for vacation submitted on Monday evening January 5, 2009 and seeking approval for vacation to be taken Tuesday January 6, through Friday January 9, 2009, inclusive.

It is noted that you commenced vacation without the requisite approval and it is deemed therefore that you abandoned your job.

As the Team Leader of the Accounting Department who vilifies your team members when they fail to honour acceptable standards of behavior we are shocked, dismayed and very disappointed by your contradictory action."

3. The claimant has taken issue with the manner of her dismissal which in her particulars of claim she describes as unfair.

In her claim form filed February 23rd, 2010 she stated inter alia:-

"The Claimant is seeking two (2) weeks' notice pay, ten (10) days vacation leave pay at Five Thousand Seven Hundred and Sixty-nine Dollars (\$5,769.00) per day provide in the (Employment Termination and Redundancy Payments) "**ETRA**" Act of 1974.

In her particulars of claim she went on to set out a claim for overtime – seven hundred and twenty (720) hours at a rate of four hundred and forty-five dollars and thirty-one cents (\$445.31) per hour.

She also seeks compensation for unfair dismissal and interest, figures to be determined by the court.

4. The defendant in their defence filed April 7, 2010 asserted that the claimant took leave without permission, thereby abandoning her job.

They further deny that she is entitled to overtime as alleged or at all since it is not the company's policy to pay overtime to management personnel such as the claimant.

The Evidence

5. It is not disputed that in January 2009, the claimant handed in a vacation and special leave form applying for four (4) days from 6/1/2009 to 9/11/2009. This form is dated 5/11/2009.

It is recognized immediately that hers is the only writing on the form. The relevant sections headed "for official use only" calling for the entitlement to be checked and leave recorded indicating whether the leave is to be approved with or without pay remains blank.

6. The claimant in her particulars of claim stated that it was customary for her to request her vacation leave verbally and after her return the request for vacation/sick leave application form would have been completed and handed to Sandra A. Lyn Shue, managing director and/or her assistant.

Further she stated that on three (3) occasions she had requested five (5) days vacation leave verbally of Sandra A. Lyn Shue, twice in November 2008 and once in December 2009. A Financial Controller had been employed after the first two requests had been made and she subsequently advised Sandra A. Lyn Shue that she would complete whatever she wanted her to do before she proceeded on her vacation.

In her witness statement/evidence-in-chief she said she applied for and was granted leave by Miss Sandra Lyn-Shue (managing director)

7. Under cross-examination she agreed that before one goes on vacation leave one was to get approval but she insisted that there was no formal requirement in place for her to fill out an application form.

She insisted further that she had discussions with Miss Lyn Shue from as far back as October 2008 about the leave but it was not until January she decided she wanted to go on leave.

She accepted that Miss Lyn Shue was not at work those early days in January 2009 so there had been no discussions at that time.

However, she insisted that whereas the requisite form had not shown approval of the leave she did get verbal approval.

8. Sandra Lyn Shue gave evidence for the defence and under cross-examination immediately acknowledged that there have been times she had given verbal approval of the claimant going on leave.

There was exhibited one leave form where the claimant had applied for six (6) days vacation leave from 16-18/8/06 to 1/9/06. This form was dated the 6/9/06 with the approval given September 7, 2006.

Miss Lyn Shue acknowledged that this was an example of one time she had given verbal approval of the claimant proceeding on leave before the requisite written approval had been completed.

9. In her particulars of claim, the claimant had explained that she was scheduled to take her leave on the 6th but due to pressing work related issues she was asked to stay on to finalize cash flow which she did up to 8 o'clock that evening before proceeding on the 7th January.

In her witness statement however, she stated that on the 6th of January she was at home, it being the first day of her vacation when she received a call from her office. She went on to describe things that took place on that day, while she was at home.

This inconsistency between these two accounts of what had occurred on the 6th of January was put to the claimant during cross examination. She asserted that what was contained in her particulars of claim was untrue and that she never said those words. However, she insisted it was not a lie per se but that the dates were mixed up.

10. The claimant accepted that she handed in the relevant form to Mrs. Deborah Chin in the absence of Miss Lyn Shue and continued to assert, as she had stated in her witness statement, that this was on the evening of the 5th January.

Mrs. Deborah Chin, in giving her evidence for the defendant, agreed that this was in fact done but she could not recall the date it happened.

What she did recall however is that the claimant at the time of bringing the document had said words to the effect that although it was not authorized she would be taking the leave anyway

Her recollection of this event was supported by Ms Anna Kay Neil who gave evidence that she was in the office at the time and overheard what the claimant is alleged to have said.

The claimant when cross-examined denied telling Mrs. Chin that although not authorized she would be taking the leave anyway. She agreed that Ms Neil worked in the office but could not recall her being present at the time she handed in her leave application from to Mrs. Chin.

11L The assertion that the claimant had said those words to Mrs. Chin took on increased significance for the defendant because of the way they were interpreted by Miss Lyn Shue, their Managing Director.

In her witness statement she had explained how she had been having problems with the claimant's conduct for several months prior to her being informed by Mrs. Chin, her assistant, that the claimant had left an unapproved leave application from with her.

She believed that the claimant proceeding on leave without obtaining approval was in fact defying her authority and such defiance could not be permitted. The information she subsequently learnt from Mrs. Chin and Miss Neil that the claimant had expressed her intention of proceeding on leave without required approval, had provided confirmation of this belief that the claimant was defying her.

12. Under cross-examination she agreed that so far as her accounting skills were concerned the claimant was a good worker. She accepted that this fact had been stated to the claimant many times over the years of her employment.

She however explained that after a financial controller was employed in a senior position to the claimant in November 2008, problems with the claimant's attitude had become apparent.

She expressed how she had found the claimant to not be as co-operative in the execution of her professional duties as had existed before the employment of the financial controller.

She described how she had had several discussions with the claimant in attempts to reassure her that she need not demonstrate being threatened by the presence of someone senior to her.

She conceded that this was never put in writing. She eventually admitted that she did not view the claimant's defiance as insubordination.

13. Further under cross-examination, Miss Lyn Shue said she believed that the claimant had abandoned her job due to her behavioral pattern and "her just leaving".

She recalled being appalled when she returned to office to find the claimant was "just not at work."

She agreed that she considered the application for leave unapproved. When asked whether upon seeing the application she considered that the claimant had gone on unapproved leave she responded that it was clear from the application that she had.

However, she maintained that when she saw the unapproved leave form she felt it was very much possible that the claimant had abandoned her job.

14. There was no dispute that a letter was sent to the claimant on the 9th January. This, the defendant saw as accepting the fact that the claimant had abandoned her job and described it as

the finalization of her services with them, thus requiring they pay her sums they felt were outstanding.

The claimant saw it as a dismissal letter and immediately called and requested a meeting with Miss Lyn Shue for her to explain the meaning of the letter. This led to another meeting with Mr. Donald Panton at which time the claimant said Miss Lyn Shue finally admitted that she gave approval for her vacation.

Under cross-examination when asked, Miss Lyn Shue said she did not recall making any such admission.

Further, when pressed she said she would not have forgotten giving verbal approval for those days taken by the claimant.

The Submissions

For the Claimant

15. For the claimant, Mr. John Bassie argued that the primary question facing the court was whether she did in fact abandon her job. He opined that a close examination of the facts and evidence surrounding and given in this matter will provide conclusively that the claimant had not done so.

He submitted that for the claimant to establish "a basis for unfair dismissal the case had to be analyzed in four stages and these are as follows. Stage 1 deals with the question Has a dismissal taken place? If the answer is yes, then Stage 2 quite naturally poses the question "Is the applicant qualified to make a claim?" when the facts are applied the Stage 1 and Stage 2 both questions can be answered in the affirmative" This would then lead to Stage 3 which comprises two limbs:-

"3(a) asks the question did the employer establish an admissible reason for the dismissal?" and the second part of Stage 3 (b) asks the question was the dismissal reasonable in all the circumstances".

In his opinion ultimately if the defendant's evidence does not yield an affirmative answer to either of these limbs of stage 3 then the "claimant's claim for unfair dismissal must succeed and the options for re-installment, re-engagement or compensation may be opened to the claimant."

16. In applying his interpretation of the evidence to his questions raised in Stage 3, Mr. Bassie opined that at its highest it would seem that the defendant would be hard pressed to establish that they had an admissible reason for the dismissal given the fact that Miss Lyn Shue had the reason in her possession (the leave form) why the claimant was not at work and therefore the defendant could not possibly defend an action establishing 'job abandonment' as an admissible reason for dismissal.

17. He argued that although the defendant in its letter of January 9, 2009 had asserted that the claimant's commencing vacation leave without requisite approval was deemed to be abandonment of the job, there was exhibited two (2) leave forms, one which indicated that leave was taken before the approval was signed off on and the other he said had never been signed by Miss Lyn Shue. This he said proved that there was not any standard requisite approval.

18. He argued further that the dismissal was not reasonable in all the circumstances given the fact that the claimant had been a good and faithful worker; and that it "may have been possible that a verbal approval could have been given by Miss Lyn Shue by her own admission and the possibility of this was affirmed by Mrs. Deborah Chin."

He pointed to the evidence of Mrs. Chin that the claimant had adequate leave owed to her to cover the four (4) days that were taken and also that no tangible proof was offered to show any marked effort to contact the claimant prior to the letter citing 'Job abandonment'. No effort seem to have been made to investigate or invite the claimant to come and discuss the issues prior to sending out the letter.

19. On the matter of the claim for overtime payment, Mr. Bassie pointed to the fact that it had come out in evidence that the claimant had worked excessive hours. He alluded to the fact that the defendant had stated that it was not its policy to pay overtime to management personnel such as the claimant; however he submitted that the claimant "believes that she should be remunerated for her excessive hours worked and had expected this".

20. In concluding Mr. Bassie submitted that the court was being asked to find that the claimant was to be compensated because she was in fact unfairly dismissed. He further humbly

suggested that although this is not a matter of redundancy, nevertheless as a guideline, the formula for working out redundancy payments could be applied in this case along with interest.

For the defendant

21. For the defendant, Ms. Davis commenced her submission by opining that although the claimant's claim was expressed as being for unfair dismissal it was assumed that wrongful dismissal was intended.

She grounded her submission in law before analyzing the evidence. Thus she pointed out that wrongful dismissal is a claim that sounds in contract which is only established where the employer wrongfully terminates the contract of employment.

Further she urged that in the event that the employee terminates the contract of employment by abandonment of the job or otherwise, there is no wrongful dismissal. Whereas on the other hand, the contract may be terminated summarily if the conduct of the employee is serious enough to warrant it; a determination of what constitutes such conduct is in accordance with the current mores of employee/employer relations.

Reference is here made to Selwyn's Law of employment 14th edition, paragraph 16.6.

22. The submission continued that if summarily dismissed, the employee is not entitled to notice, however, either party is at liberty without any reason to bring the contract of employment to an end by giving the requisite notice.

In a contract where no period of notice is agreed, the minimum notice is set out in Sec. 3 of the Employment (Termination and Redundancy Payment) Act. In the instance case, the claimant having been employed for approximately four (4) years if dismissed (other than summarily) she would have been entitled to a minimum period of notice of two (2) weeks.

Ms. Davis submitted therefore that in the event the court finds that the employee did not terminate the contract and/or that the defendant was not entitled to summarily dismiss the employee, then the employee would have been wrongfully dismissed.

23. The measure of damage in such circumstance would be to put the innocent party in a position in which he would have had been had the contractual obligations been performed, is the position urged by Ms. Davis.

She referred to Selwyn on Employment para. 16.8 for support in this position.

Further she urged the measure of damage would be the period of notice that should have been given pursuant to the statute.

Ref- Focsa Service (UK) Ltd. v Berkett 1996 1 RLR 325

The position in the Jamaican courts, she argued, is to be seen in Kaiser Bauxite Co. v. Vincent Cadien (1983) 20 JLR 168 where in the head note is stated:-

(v) per curiam; "in a case of wrongful dismissal, the damages recoverable is the estimated pecuniary resulting as a reasonable and probable consequence from the premature determination of the employee's service. Since under the Employment (Termination and Redundancy Payments) Act the respondent would have been entitled to be given six (6) weeks notice of termination if no cause had been shown, that would have been the appropriate measure of damages for his dismissal if wrongful".

Applying this to the instant case, Miss Davis submitted the claimant worked for less than the five (5) years so if successful would be entitled to two (2) weeks notice pay.

24. She went on to submit that the issues before the court are:-

- "(i) whether the claimant abandoned and therefore herself terminated her contract of employment. If the answer to this is no then
- (ii) whether the defendant was entitled to summarily dismiss the claimant.
If the answer to this is no, then the claimant would have been wrongfully dismissed. The remaining issue would therefore be
- (iii) what is the measure of damages appropriate in the instant case?"

25. In applying the law to the facts Miss Davis first considered whether the claimant had abandoned her job. The court is urged to consider the following as proof that she had:-

- (i) She decided to go on leave on the 2nd of January a time when managing director was not at work. Hence, her admission under cross-examination that she did not speak to Ms. Lyn Shue, with regard to this leave, in 2009 meant that her evidence in her witness statement that she applied for and was granted leave by Ms. Lys Shue is not true.
- (ii) The claimant initially said it was not a requirement that she fill out leave form before she went in leave, yet subsequently said she had given the leave form to Ms. Chin "because

this was the procedure" meant she was well aware of the procedure and absented herself without the required permission.

- (iii) The fact that in her particulars of claim she said the first day of her vacation was the 1st January whereas in her witness statement she said it was the 6th coupled with the fact that she sought to deny the contents of her particulars of claim was indication that the claimant is quite mixed up and unsure of the events leading to her abandonment of her job. From this it was submitted that her account with regard to the same should not be relied on.
- (iv) The evidence of Miss Neil and Mrs. Chin is to be accepted as to the fact that the claimant deliberately said words to the effect that although her leave was not approved she was taking it anyway. This it is submitted meant that her going on leave without permission was not just a procedural error but "a deliberate act that she was not concerned about her employment".

26. In the alternative it was submitted that the defendant was entitled to summarily dismiss the claimant. It was argued by Miss Davis that the claimant went on leave without permission and deliberately announced this intention in the presence of junior employees which amounted to behavior deliberately defying the authority of her employers; such behavior being intolerable. This further was particularly intolerable conduct by a person employed as an accountant, which is a relatively senior position. It was submitted that "by ordinary standards of today the claimant's action is serious enough to warrant summary dismissal".

27. In the alternative, it was submitted that in the event the court finds the claimant was wrongfully dismissed, the measure of damage should be the statutory minimum which the claimant gave in her claim form as being \$57,692.30.

Miss Davis pointed to a lack of evidence before the court that the claimant had any difficulty securing alternative employment or that she sought to mitigate damages by seeking alternative employment. Further, she noted it is not known how long, if at all, she was unemployed after this employment ended.

28. The claimant in her claim form states that she was summarily dismissed and was thus seeking two (2) weeks notice pay and ten (10) days vacation leave pay. In her particulars she states that this dismissal was unfair and seeks compensation for this unfair dismissal.

29. It is recognized that the Jamaican legislation does not contain any express provision calling for all dismissals to be justified.

Further it is accepted that the common law position of summary dismissal continues to exist, hence an employer is able to terminate the employee's contract without notice for serious misconduct and breaches of confidentiality. Where there is no notice, the terminated employee is entitled to payment in lieu of notice.

The issue of wrongful dismissal arise where there is no evidence for termination without notice and the question of unfair dismissal means that the employer has to demonstrate that there is good reason for dismissing an employee.

30. In the leading text on this subject area "Selwyn's Law of Employment; the authors refer to a Privy Council decision in discussing the matter of summary dismissal.

In **Jupiter General Insurance Co. v. Shroff** [1937] 3 AllER 67 it was held that summary dismissal was a strong measure, to be justified only in the most exceptional circumstances.

Significantly also the text also makes note of the fact that an action for wrongful dismissal is different from a claim for unfair dismissal although overlapping may be apparent.

At page 387 para. 16.15 of the 14th edition it is stated:-

"But, in particular it should be noted that the sole issue in a wrongful dismissal action is whether or not the employer had broken the contract of employment. The "reasonableness" of the employer's conduct is not in issue nor does contributory conduct by the employee come into the equation".

31. The recent decision of our local Court of Appeal of the **Industrial Dispute Tribunal v. University of Technology Jamaica and the University and Allied Workers Union** [2012] JMCA Civ. 46 is somewhat instructive although the Court was, admittedly, determining a matter not directly on point with the issues in the instant case.

In that case the court had to consider the proper questions to concern the "IDT" in reviewing a worker's dismissal. The Judge in the lower court had found the English cases

dealing with the matter of "fairness" as persuasive authority. The Court of Appeal per the dictum of Brooks J.A. found this to have led into error as those cases were based on a statutory regime that is different from that establishment by the Labour Relations and Industrial Disputes Act.

At paragraph 42 Brooks J.A said:-

"Her view was informed by a reliance on the English authorities which determined fairness on whether the employer acted reasonably in dismissing the employee. I have already stated why I find that those authorities are inapplicable to our jurisdiction".

32. In the instant case, the defendant is alleging that it was the employee who terminated her contract. It is accepted that this situation can arise where the employee leaves her position and absents herself therefrom without justification or permission. Thus there may be circumstances where the conduct of the employee can be such that an employer will be allowed to infer that they have resigned thereby abandoning their job.

In Harrison v. George Wimpey and Co. Ltd. 1972 7 ITR 188 Sir John Donaldson said succinctly:-

"Where an employee so conducts herself as to lead a reasonable employer to believe the employee had terminated the contract, the contract is then terminated".

33. In any event, one needs go back to consider the nature of the position that exist at common law for an employment contract being brought to an end.

In Mallock v. Aberdeen Corporation 1971 2 All ER 128 Lord Reid at page 1282 commented:-

"At common law a master is not bound to hear his servant before he dismisses him. He can act unreasonable or capriciously if he so chose but the dismissal is valid. The servant had no remedy unless the dismissal is in breach of contract and then the servant's only remedy is damages for breach of contract."

34. On the issue of the damages to be awarded if the dismissal is held to wrongful the old authority of **Addis v. Gramophone Ltd. 1909 AC 488** remains instructive where it was held:-

"where a servant is wrongfully dismissed from his employment the damages for the dismissal cannot include compensation for the manner of his dismissal, for his injured feelings or the loss he may

sustain from the fact that the dismissal of itself makes it more difficult to obtain fresh employment. "

Application of the law to the facts

35. It needs first be noted that the approach taken by Mr. Bassie in his submissions in inviting the court to consider "whether the employer established an admissible reason or the dismissal" and "whether it was reasonable in all the circumstances" cannot be the correct one. The issue for the Court's determination is whether the employee should have been dismissed summarily or whether she in fact "abandoned" her job.

36. It is noted that there is no dispute that the claimant was a competent worker who had received commendations with no apparent serious infractions on her employment record.

It is of concern however that in seeking to support his submissions in this regard, Mr. Bassie sought to refer the court to documents attached to the claimant's particulars of case which had not been admitted into evidence or agreed between the parties to be exhibits in this case. They were accordingly not considered.

37. From the evidence I am satisfied that the practice that existed between the claimant and her employees was such that she could go off on leave without the requisite form being completed.

I am also satisfied that verbal approval of her progressing on leave had up to this time been sufficient.

There was a significant change in the relationship between the claimant and the managing director, that to my mind influenced the decision of the company to terminate the claimant's employment even outside of her progressing on leave without the form being signed, meaning the leave was not formally approved.

38. The evidence of Miss Lyn Shue suggested that as managing director she had formed the view that the claimant seemed to have taken objection to the employment of a Financial Controller viewing this as a possible threat to her position. Miss Lyn Shue spoke of the claimant being un-co-operative and whereas she could not speak of the behavior as seriously insubordinate, it was one with which she was satisfied was somewhat defiant.

She admitted that her assessment that the claimant had abandoned her job was grounded in the behavioral pattern most recently observed.

39. It is not without significance that the claimant used the employment of this Financial Controller as a point of reference for when she first started discussing with Miss Lyn Shue her desire to go on leave from 2008.

It is clear that these discussions could not have taken place in 2009 as the claimant acknowledge that Ms. Lyn Shue was not at work up to the time she handed in her leave application form. This does not however lead to the inevitable conclusion that discussions had never taken place.

The question as to whether they had, to my mind was never directly answered by Ms. Lyn Shue although she did say she would not have forgotten giving verbal approval for those days. This leaves one to believe that the discussion could have well taken place without final agreement as to which days would actually have been taken.

40. In any event, the claimant did not just disappear from her position without any explanation. She handed in a document clearly indicating when she intended to return from leave there is no dispute that she had leave entitlement.

Ms. Lyn Shue maintained that from the application, it was clear that the claimant had gone on unapproved leave. From this admission it is somewhat disingenuous to say that someone who had taken leave albeit unapproved could still be viewed as abandoning their job.

Given the practice that had obtained, where the leave could be formally approved after it was taken, to view what the claimant did as terminating her own employment is unsustainable.

It is even more suspect that this letter indicating she was viewed as abandoning her job was delivered to her on the last day of her unapproved leave.

41. In all the circumstances I am satisfied that the claimant did not abandon her job. The defendant has asked the court to consider in the alternate that the claimant's behavior was such that required summary dismissal. In her submissions Miss Davis points to this act of going on leave without permission and deliberately announcing in the presence of junior employees that

she was proceeding on leave without permission as behavior amounting to defying the authority of her employers.

Miss Lyn Shue expressly stated that position in her witness statement.

Once again, referring to the practice that had existed prior to this "unapproved leave taking", I cannot agree that this conduct was serious enough to warrant dismissal.

42. Hence, I find that in the circumstances the claimant's dismissal was wrongful.

She is therefore entitled to what the law recognizes – she is to be put in the position she would have been if the contractual obligations had been adhered to. She would have been entitled to notice in keeping with the length of her employment or to payment in lieu of same. Her term of employment was approximately four (4) years hence she would be entitled to two (2) weeks notice.

In her claim from she recognized this to be her entitlement and ask for two (2) weeks' notice pay and then (10) days vacation leave pay at \$5,769.00 per day. It is noted that this issue of vacation leave was settled between the parties, this leaves just the two (2) weeks' notice pay.

43. The final matter to consider is the question of her entitlement to overtime pay.

The unchallenged evidence of the managing director is that persons employed in the capacity of the claimant were expected to work long hours and overtime did not arise, hence there was no agreement for payment for such work. In any event, the claimant in her particulars threw up figures for this award without any evidence to support how they were arrived at.

I am therefore unable to make an award under this heading.

Order

1. Judgment for the claimant in the sum of fifty-seven thousand, six hundred and ninety-two dollars and thirty cents (\$57,692.30) with interest at 3% from 9th January, 2009 to today's date.
2. Cost to the claimant as would have been awarded in the Resident Magistrate's Courts to be taxed if not agreed.