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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C.L. A032/1996

BETWEEN	MAVIS ALLISON	CLAIMANT
AND	ALCOA MINERALS OF JA. LTD	DEFENDANT

M. Frankson instructed by Gaynair & Fraser for the Claimant

K. Anderson instructed by Dunn Cox for the Defendant

Heard: November 15, 22, 2007 and March 31, 2008

Safe Place of Work - Negligence-Breach of Contract

Beswick J

1. Ms. Mavis Allison (the claimant) worked as a Security Guard in the mines of Alcoa Minerals of Jamaica Ltd. (Alcoa), (the defendant). Whilst on the job she suffered an injury when she was seeking shelter from the rain. She has filed suit against Alcoa claiming damages for negligence and/or breach of contract, alleging that Alcoa failed to provide and/or maintain proper and/or adequate shelter for her during the course of her employment.

2. I find that Alcoa is liable for her injuries and my reasons follow.

3. **Facts**

Ms. Allison's duty was to watch a tractor located at the mines of Alcoa in McCain. McCain is "pure bush", according to Ms. Allison, and there was no place there for her to shelter from the elements. On June 10, 1994 when the rain started to fall, Ms. Allison was climbing onto the tractor to take shelter under its canopy when she fell and broke her arm. She remained there, without help, for about half-an-hour before her supervisor arrived. She eventually reached the May Pen Public Hospital where she received treatment.

4. **Defence**

Alcoa's defence is that Ms. Allison was an independent contractor and that Alcoa therefore had no duty to provide shelter for her and further that she had been expressly instructed not to climb on the equipment which she had been hired to watch. In addition, Ms. Allison knowing the risk involved voluntarily undertook to do the job and therefore any injuries which she sustained would not be the responsibility of Alcoa. In any event, contends Alcoa, even if there were negligence on its part, Ms. Allison was herself negligent.

5. ***Employment Relationship***

The first issue to be determined is whether or not Ms. Allison was an independent contractor or whether she was an employee of Alcoa.

6. Mr. Anderson, Counsel for Alcoa, submits that there is no evidence that Ms. Allison was an employee of Alcoa. He maintains that Ms. Allison is an independent contractor because she worked for one two-week period every three months and the lack of continuity of the relationship between Ms. Allison and Alcoa made it evident that they did not intend to create an employment relationship. [**Market Investigations Limited v Minister of Social Security** [1969] 2QB 173].

7. The unchallenged evidence which I accept as true is that Ms. Allison (a) earned a monthly salary, (b) was told by Alcoa where to work and what hours to work, and (c) was supervised by Alcoa's security personnel who would check with her three times during each shift. I also accept as true her evidence that Alcoa said nothing to her about her being responsible for her own gear and equipment.

8. These factors cause me to form the view that Ms. Allison was not an independent contractor. Although her employment was intermittent, whenever she worked she was in my view controlled by Alcoa as their employee.

9. **Safe Place of Work**

An employer must take all reasonable precautions for the safety of his employees. He must "take reasonable care so to carry out his operations as not to subject those employed by him to unnecessary risk." [**Wilson v Tyndale Window Cleaning Co** [1958] 2 QB 110, per Pearce L.J. at 121].

10. It is my finding that Alcoa failed to take care. I accept as true the evidence that there was no provision made for persons to work out there in the mines. Little regard was paid to the safety of workers which is exemplified by the unchallenged evidence that Ms. Allison remained alone, helpless on the ground for some time. Alcoa, in employing persons to work in what is described as "the bush", round the clock, ought at the very least to provide shelter for the workers from the elements. In the absence of such provision the worker may well be forced into

unsafe situations in order to seek refuge from rain, lightning, sun and the elements in general.

11. **Liability**

The next question is whether, Alcoa, having failed to provide a safe place of work is responsible for Ms. Allison's injury.

Mr. Anderson submits that since Ms. Allison was injured when she climbed on the tractor, the chain of causation was broken. Alcoa's duty would not have extended so far as to protect her from falling from a tractor as she was working as a Security Guard and therefore liability would rest on Ms. Allison for failing to take care herself.

12. It must be determined whether when Ms. Allison fell from the tractor such an incident was reasonably foreseeable.

In **Doughty v Turner Manufacturing Co. Ltd.** [1964] 1All ER 98, Lord Pearce referred to the judgment of the Privy Council in the **Wagon Mound** case [1961] 1 All ER 404 where Lord Simonds said,

> "After the event, even a fool is wise. Yet it is not the hindsight of a fool but it is the foresight of the reasonable man which can alone determine responsibility." (p.14)

13. It is my view that Alcoa ought reasonably to have foreseen that Ms. Allison might be on the job whilst rain was falling and be in need of shelter. Indeed the evidence for Alcoa is that it gave Ms. Allison directions that in the event of rain, she should go home or go to any nearby house to seek shelter. I accept that there were no nearby houses and in any event she did not know the occupants of any of the nearest houses nor had Alcoa informed her of any arrangements made by Alcoa for her to utilize those houses. Alcoa made no arrangements for her to even answer calls of nature whilst she was alone in "the bush". I see no evidence of any provision by Alcoa for her welfare and I reject the evidence that Alcoa told her not to go onto the tractor. It is my view that Alcoa did not concern itself with the details concerning the comfort or safety of Ms. Allison. It did not bother itself to issue instructions to ensure Ms. Allison remained safe.

She was left to fend for herself.

14. I find that it was reasonably foreseeable that she would seek shelter from the tractor, as that was the only place with a cover. The actual damage suffered by Ms. Allison was damage which

could be foreseen as likely to result from climbing onto wet steps of a tractor. The risk of falling off the tractor was reasonably foreseeable and Alcoa ought to have taken steps to prevent that.

15. **Volenti Non Fit Injuria**

Mr. Anderson on behalf of Alcoa submitted that Ms. Allison freely and voluntarily and with full knowledge of the circumstances and the risk involved agreed to do the job. She therefore ought not to complain when she is injured, having accepted the risk.

16. I find that Ms. Allison knew of the risk to which she was exposed by Alcoa's failure to provide a safe place of work, but in my view that knowledge did not amount to her consent to the risk. She simply accepted the job opportunity which presented itself because she "wanted the money."

17. **Contributory Negligence**

Mr. Anderson for Alcoa submits that Ms. Allison was 70% liable for her injuries since she elected to climb onto the slippery tractor in the night, which was not part of her duties.

There is no evidence that Ms. Allison acted in any way other than in a reasonable and prudent manner. In any event contributory negligence was not specifically pleaded and I therefore reject the submission that she is contributorily negligent.

18. **Injuries**

Ms. Allison's evidence is that her left arm was broken. One of the bones in the arm "shub out" and she was in a lot of pain.

At the May Pen Hospital a doctor wrapped her arm with a bandage and on the following day her arm was x-rayed and then placed in a cast.

19 When the cast was removed eight weeks after, her arm was swollen but there is no evidence as to whether or not she received additional treatment.

There are no medical reports concerning her present condition. However, it is her evidence that something has grown on her arm in the area of her wrist and she is unable to lift heavy weights with her left arm or to wash clothes. She states that she is still enduring pain.

Mr. Frankson submitted on behalf of Ms. Allison that she should be awarded $550,000.00. He relied on **Samuel Durrant v United Estates Ltd** SCCA 76/91, which concerned injury to two wrists and pain to the chest and knees with 20% loss of movement of the wrists. The award there was the equivalent of $481,086.75. Injuries there were more severe than Ms. Allison's.

The other authority on which he relied, **Byron Bailey v Webb** CL 1990/B017 concerned fracture of the forearm with severe scarring of the claimant's face and permanent 10% disability of the arm. These injuries were awarded the equivalent of $517,732.75. They were clearly graver than Ms. Allison's.

20. Evidence of Ms. Allison's medical condition is insufficient and not up-to-date. There is no medical evidence detailing whether or not she continues to suffer as a result of her injury. Mr. Frankson submitted only two authorities to support his claim and both involved injuries far greater than Ms. Allison's. In the circumstances, based on the evidence and authorities presented, I find that $375,000.00 is a reasonable amount for her pain and suffering and loss of amenities.

21. **Special Damages**

Medical expenses and travelling expenses totalling $1490.00 are not in dispute. Ms. Allison claims $12,000.00 for a domestic helper hired by her for five months at $500.00 per week. It is unchallenged that she wore a cast for about two months and that after the cast was removed her arm remained swollen. She was unable to do washing for her family and herself and she had pain.

22. There is no evidence as to when the swelling subsided and I therefore use two-and-a-half months as a reasonable period during which she would need additional help in the house. I place no responsibility on her daughter to provide these services gratuitously. I therefore award $6,000.00 for that expense being half of the amount pleaded for five months.

23. *Loss of Earnings*

Mr. Anderson for Alcoa argues that it is not certain that she would have worked for six months in view of the relationship that existed with Alcoa. I agree with that submission. The evidence is that she worked for two-week periods every three months, and had done so with some regularity. I accept that as

being true. It follows therefore that in the six-month period for which she claims damages she would have worked twice, two weeks each time. Her evidence is that her wages were $8,000.00 per month i.e. 4 weeks. I therefore award $8,000.00 for her loss of earnings.

The total amount for special damages is therefore $15,490.00.

24. **Orders**

The orders I make therefore are:

Judgment for the claimant as against the defendant.

1. General Damages for pain and suffering and loss of amenities assessed in the amount of $375,000.00 with interest at 6% per annum from date of service of Writ to June 21, 2006 and at 3% per annum from June 22, 2006 to today.
2. Special Damages assessed in the amount of $15,490.00 with interest at 6% per annum from June 10, 1994 to June 21, 2006 and at 3% per annum from June 22, 2006 to today.
3. Costs to the claimant to be agreed or taxed.