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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2000/G-027

BETWEEN	***DERRICK GAYLE***	***CLAIMANT***
A N D	***ALCAN JAMAICA COMPANY***	***1ST DEFENDANT***
A N D	***WAVEL DALE***	***2ND DEFENDANT***

AND

CLAIM NO 2004/HCV-1351

BETWEEN	***DERRICK GAYLE***	***CLAIMANT***
A N D	***WEST INDIES ALUMINA COMPANY JAMAICA LIMITED***	***DEFENDANT***

Miss Carol Davis instructed by
Mesdames Carol Davis and Company for Claimant.

Miss Maliaca Wong and Miss Francene Fletcher instructed by Myers, Fletcher and Gordon for Defendants,

Heard: February 23, 24, March 4 and March 31, 2005.

Coram: Harris J.,

These are consolidated claims. In Suit CL. 2000 G 027, the claimant seeks to recover damages from the defendants for slander, trespass and or conversion, or, alternatively, the return of a size 5 Allen Bradley Starter, or, payment for its value and damages for its detention. In suit HCV 1351 of 2004, the Claimant's claims against the defendant are for damages for negligence and or breach of contract of employment.

The Claimant is an Electrical Technician and was at the material time employed to Alcan Jamaica Company Limited, the defendant company, at their Ewarton Works in Saint Catherine. Sometime in the year 2002, West Indies Alumina Company took over Alcan Jamaica Company Limited. Mr. Wavel Dale, the 2nd defendant, was at the material time the Corporate Security Administrator in the employ of the defendant company.

On October 8, 1999 a used size 5 Allen Bradley starter was discovered in the trunk of the Claimant's white Toyota Camry motorcar which was parked in the car park of Alcan Ewarton Works. Alcan uses size 5 Allen Bradley Starters at its Ewarton Plant.

The Claimant was assigned to the defendant company's Power and Instrument Electrical Department and had access to all their Starters, including size 5 Allen Bradley starters. He was interrogated and gave a statement touching the incident. He was subsequently suspended from work pending investigations into the matter. He was summarily dismissed on October 22, 1999.

It is the claimant's evidence that the used Size 5 Allen Bradley Electrical Starter which was found in the trunk of his car had been given to him by a Mr. Delvin Brown, prior to October 1999 for the purpose of selling it or for its use in private jobs.

His car and that of another employee were searched by the 2nd defendant. The Starter was among other things in the trunk of his car. He

informed the 2nd defendant that the Starter belonged to him. The 2nd defendant then pointed to the Starter and in the presence of other employees, referring to Mr. Owen Parkes and himself, said, "I am going to call the police to lock unoo up". He was suspended on October 11, 1999 pending investigations into the matter and was subsequently dismissed on October 22,1999. He has been unable to find permanent employment since his dismissal.

The defendant's case is that on the morning of the incident, Mr. Owen Parkes, an employee of the defendant company drove the company's W920 pick up from the company's compound to the car park, removed an object from the vehicle and placed it in the Claimant's white Camry motorcar which was in the car park. Shortly thereafter, the Claimant's car was searched and a used size 5 Allen Bradley Starter was found in the trunk of his car. This Starter was identical to those used by the defendant company.

Mr. Dale, the 2nd defendant, attempted to take the Starter from the car but the Claimant objected and only permitted it to be taken after Mr. Dale threatened to call the police. Investigations were carried out. The Claimant was suspended and finally dismissed.

It will therefore be necessary for me to determine the following issues:

1. Whether the 1st defendant is vicariously liable for slander of the claimant, if it is found that the 2nd defendant used words

defamatory of the Claimant.

2. Whether the words complained of were used by the 2nd defendant and if they were, whether they are capable of being defamatory in their natural and ordinary meaning and were made with reference to the claimant.

3. Whether the defence of qualified privilege or the defence of Justification avails the defendants.

4. Whether the defendants retention of the Starter is inconsistent with the rights of the claimant.

5. Whether the Claimant had been dismissed negligently or in breach of contract.

6. The appropriate measures of damages to be awarded to the claimant, if the defendants are found to be liable.

I will first consider whether the 1st defendant is vicariously liable for the statement made by the 2nd defendant. The general rule is that a master is liable for the acts and omissions of his servant, either in obedience of the master's orders, or, executed by him during the course of his employment. However, no right of indemnity exits where the servant incurs liabilities for his own purposes, or, where liabilities are unauthorized by the master, though done on the master's behalf.

The second defendant was a security personnel in the employ of the defendant company. On the day of the incident he was performing his duties as the Security Administrator. All events touching his interaction and communication with the claimant which occurred on October 8, 1999 were done by him in the course of his employment and would be covered by the implied authority of the defendant company. They would therefore be liable for his actions.

The next matter which falls for consideration is whether the 2nd defendant used words amounting to slander of the claimant. The learned author of Gatley on Libel and Slander at page 29 paragraph 2.1 recognizes the tort of defamation in the following context: -

> *" A statement is defamatory if it tends to harm the reputation of another so as to lower him or her in the estimation of the community or to deter third parties from associating or dealing with him or her."*

A defamatory statement produces the proclivity to cause injury to the reputation of the person to whom it refers. It lowers him in the opinion of right thinking members of society. The statement is assessed by societal norms, the normal standards of right thinking members of society. The test therefore is an objective one. It is whether the statement made tends to arouse antagonistic or hostile feelings or opinions of other persons against

the Claimant.

It is necessary at this stage to determine whether the 2nd defendant had used the words "I am going to call the police to lock unoo up". He denied using those words to the claimant. The witnesses for the defence Mr. Delroy Scott and Mr. Keith Reid who were present stated that they did not hear him use those words. I accept that those words were not used by him.

However, if contrary to my finding it is acknowledged that he had used those words, a further question to be answered is whether they were slanderous. In the first place it is clear that the 2nd defendant was addressing the claimant, although this statement would have also been made with reference to Mr. Parkes. Secondly, it is undeniable that the 2nd defendant was implying that the claimant was guilty of theft. An accusation of theft would tend to impugn his reputation and lower his self-esteem. All well thinking members of society would view him with contempt and disdain. The words were calculated to cause ordinary reasonable citizens to shun him.

Although the 2nd defendant has denied making the statement, the defendants seek to rely on the defence of qualified privilege. This, they can properly do. Qualified privilege was defined by Lord Atkinson in ***Adams v Ward (1917) A.C. 309 p. 344*** as follows:-

"A privilege occasion is, in reference to qualified privilege, an occasion where the person who makes the communication has an interest or a duty, legal, social or moral to make it to the person to whom it is made and the person to whom it is made has a corresponding duty to receive it. This reciprocity is essential"

In order for the defence to succeed, the occasion under which the statement was published must be one in which the maker of the statement has a duty or an interest to make it and the recipient has an interest to receive it, the communication must be "fairly warranted by the occasion" and it must be published from right and honest motives, that is without malice.

A defendant is protected by privilege even if the language is strong, if having regard to all the circumstances; he honestly on reasonable grounds believed that what he said was true and necessary for the purpose, even if it were not in fact true. To place reliance on the defence of qualified privilege the defendants must show that they had acted in good faith.

Statements made by a master with respect to a servant's character are generally made on occasions of qualified privilege. But such privileged occasions usually extend to communications by the master, to either prospective, or, previous employers of the servant. A statement made to others is not covered by privilege except the person to whom it was made

has a common interest in the subject matter of the statement. It may be made to a fellow servant, as the master may have an interest in making it to a fellow servant and he may be a person having an interest in receiving it.

In ***Sommerville v Hawkins (1851) 10 C.B. 538,*** a Plaintiff who had been dismissed by the defendant from his employment, was summoned by the defendant to receive his wages. In the presence of two other employees the defendant stated that the Plaintiff had been dismissed for robbing him and that they should not have anything to do with him in the future. The Plaintiff's action for defamation was non-suited. On appeal it was held that the non-suit was correct as the defendant had a duty and interest in making the statement, which was privileged and his good faith could not be called in question without evidence of malice.

Did the 2nd defendant have an interest or a duty to have made the statement? Did any of the persons to whom it was communicated have a corresponding interest in receiving it.

The 2nd defendant and Mrs. Glenise Baker Guy, a security officer of the defendant company, related that on the morning of the incident they saw Mr. Parkes remove an object from the company's vehicle, a W 920 pick up, which he had driven through the gate of the company's compound and placed that object in the Claimant's car. Mrs. Baker Guy said he took the object from the back of the pick up while the 2nd defendant said he took it

from inside the back of the cab of a double cab pick up. It is immaterial from which area of the pick up Mr. Parkes had taken the object. It is clear that they both saw him remove something from the pick up which was deposited in the trunk of the Claimant's car and this I accept. The second defendant said it appeared to be a heavy object.

All persons from the Power and Instrument Electrical department at the Plant had access to the tool crib in which used Starters, inclusive of size five Allen Bradley Starters, among other things, were stored. The Claimant had access to them, so did Mr. Parkes.

There is a policy in place whereby all vehicles leaving the compound should be searched at the gate. The security guards there do not always adhere to this rule. Therefore, it is possible that Mr. Parkes could have transported the Starter to the Claimant's car without being detected by the guards at the gate.

Mr. Delroy Scott, the Team Leader of the Power and Instrument Department, stated that when the Claimant was asked about the contents of the trunk of his car, he asserted that his tools were in it. When he was requested to open the trunk of the car, he refused initially. He however relented. When the 2nd defendant attempted to remove the starter in order to conduct investigations in the matter, he objected. He said the starter was his and could not be taken from his car. The 2nd defendant said that he would

call the police. After the claimant opened the trunk and the 2nd defendant saw the Starter, it is likely that at this time he said, "I am going to call the police to lock unoo up."

Size 5 Allen Bradley Starters are not commonly used in Jamaica. Although there were no special marks of identification on the Starter in question and Mr. Reid said that he did not know if prior to October, 8, 1999 any size 5 Allen Bradley starters were missing from the tool crib, the Starter found in the trunk of the Claimant's car was identical to those used by the defendant company. Mr. Parkes was seen by the two security personnel to have placed a object in the claimant's car shortly before the size 5 Allen Bradley Starter was found in it. The Claimant was disinclined to open the trunk of the car when he was confronted. Before the trunk was opened he maintained that it contained his tools. His assigned tools were in fact in the trunk of the car but he had made no mention of the Starter. It is obvious that the 2nd defendant would have had reasonable and probable cause to have suspected that the Claimant had either stolen the Starter from the defendant company or received it knowing that it was stolen.

The statement was communicated to Mr. Scott the Team Leader of the department to which the Claimant was assigned, to Mr. Reid, an Electrical Technician and Mr. Amos a security guard. The 2nd defendant had an interest and a duty to make the statement to all these persons, they being employees

of the company. They all would have had an interest in the subject matter of the statement.

However, even it is felt that Mr. Scott, the supervisor of the department to which the claimant was assigned would be the only person who would have had an interest in receiving the statement, it is irrelevant that the other men had heard. Once the 2nd defendant had spoken the words with some honesty of purpose, the fact that other uninterested person had heard, would not deprive him of the benefit of the defence.

In Toogood v Sprying (1834) 1 Cr. M & R 181 Parke B said

> *" In cases of slander, where the defendant spoke the words complained of with honesty of purpose to a person or persons who had some legitimate interest, or some duty in the matter, the mere fact that one or even several (legally) uninterested persons happen to be present and heard what was said will not necessarily prevent the occasion from being privileged"*

Not only did the defendants have a duty and an interest to make the statement and Messrs. Scott, Reid and Amos, being other employees of the defendant company, had a corresponding interest to receive it but it was fairly warranted by the occasion. The 2nd defendant had very good reason to believe that the Starter belonged to the defendant company and that the claimant had stolen it, or had received it from another employee, with the knowledge that it was stolen. The statement was fairly made by the 2nd

defendant in discharging his duty in the capacity of the defendant company's security administrator.

A further matter to be addressed is whether the 2nd defendant was moved by malice to have made the statement. The defence of privilege may be defeated on proof of malice. If a statement is made maliciously, but falsely, a defendant will be liable even though he has good reason for believing it is true. His motive for making a slanderous statement on a privileged occasion may be an improper one even if he believes the statement to be true .The defence of qualified privilege would not avail the defendants if it is established that the 2nd defendant was moved by malice when he made the statement, that is, he had acted with improper motive.

The onus of proof of malice on the part of the 2nd defendant rests on the Claimant. He must prove that the 2nd defendant's motive for making the statement was improper. It is sufficient for him to disprove the existence of a proper motive. However, he must show that 2nd defendant had no genuine belief in the truth of the statement.

The 2nd defendant had seen Mr. Parkes deposit an item in the Claimant's car. A size 5 Starter was found in it. The Claimant was reluctant to open the trunk of his car when he was requested so to do. In light of all the circumstances, the 2nd defendant being a reasonable and prudent man would have honestly believed that the Starter was the

company's property and would have been reasonably led to the conclusion that the claimant was guilty of the crime imputed. There is no evidence that the 2nd defendant was acting out of animosity against the claimant. The statement was made bona fide and devoid of malice. No improper motive can be attributed to the defendants for making the defamatory statement.

The defence of Justification has also been pleaded by the defendant. This defence requires the defendant to prove that the defamatory statement is true. The common law affords no protection to a Claimant whose transgressions have been communicated to others. The gravamen of this defence is that the interest of free speech takes precedence over the security of reputation. It is sufficient to show that the statement is true in substance, if the essence of the imputation is true.

The size 5 Allen Bradley Starter was found in the Claimant's possession. One of his co-workers was seen putting an object in his car. A search of the car was conducted shortly thereafter. Investigations by the defendant company revealed that Starters were missing from their stock. The Claimant has not proffered any credible account of how he came to be in possession of the Starter. On the balance of probabilities the Starter is the property of the company. The statement made by the 2nd defendant would be true. The defendants are protected by the defence, as the 2nd defendant is justified in making the statement.

I now turn to the issue of conversion and trespass. Conversion is the deliberate interference with a chattel of another, without lawful justification, in a manner inconsistent with his rights, depriving him of its use and possession. The essence of conversion is willful and wrongful interference. To succeed, a Claimant must show that a defendant dealt with a chattel in a manner inconsistent with his right of possession of it and had the intention of denying him a right to it, or assumed a right, which is inconsistent with his right to it.

Trespass is " a wrongful act done in disturbance of the possession of the property of another". Generally, the act must be an unlawful at the time of committal.

The Starter found in the Claimant's car is not commonly used in Jamaica. It is used in the defendant company's business. The Claimant gave the 2nd defendant and Mr. Scott conflicting statements as to how he came to be in possession of it. Before the car trunk was opened, if his claim to the Starter was genuine, he would have indicated that he had a Starter as well as his tools in it. Investigations by the defendant company revealed that size 5 Starters was missing from their Power and Instrument Electrical Department.

The claimant said the Starter was given to him by Mr. Brown either to be used or to be sold by him. I do not regard the Claimant a witness of truth.

I am not persuaded that he had received the Starter from Mr. Brown; nor am I convinced that the account advanced by Mr. Brown as to how he came to be in possession of the Starter is true. The claimant, therefore, has not established a possessory right to the equipment. It follows that he has not shown that the defendants had deliberately interfered with his right of possession of the Starter and dealt with it in a manner inconsistent with his right to it, thereby depriving him of its use. Nor has the defendants committed any wrongful act to disturb any possession of the Claimant of the Starter.

I will now address the matter of negligence. Negligence is based on the premise that where there is a duty to exercise care. Reasonable care must be taken to prevent acts or omissions which are reasonably foreseeable. Did the defendant company have a duty of care to the Claimant and in the failure to exercise reasonable care the Claimant had been wrongfully dismissed?

In my opinion, the evidence of the Claimant regarding the Starter is unauthentic. He asserted that it had been given to him by Mr. Brown sometime in March or April 1999. Mr. Brown said he had delivered it to him in June 1999. He declared that Mr. Brown had requested him to keep or sell it for $30,000.00 to $40,000.00. Yet, strangely, Mr. Brown said that they did not agree on a sale price. Surely, if Mr. Brown had given him a Starter for sale, he would have been aware that they had agreed on a price.

The Starter found in the trunk of the claimant's car was identical to those used by the company. Mr. Parkes was seen by two security personnel placing an object in the Claimant's car. Both the Claimant and Mr. Parkes had access to all Starters in the company's Plant.

Mr. Parkes said his reason for going to the car park in the company's vehicle was in order to get his tools, as, on his arrival at work that morning he discovered a problem with the battery of his car. I find it incomprehensible that Mr. Parkes had driven from his home in Eltham Park to his place of work at Ewarton and suddenly became aware of his battery problem after arrival at Ewarton. I do not accept that he went to the car park to attend to his battery. I find he had gone there to deposit the defendant company's size 5 Starter in the Claimant's car.

Additionally, the circumstances surrounding the acquisition of the Starter by Mr. Brown and its delivery to the claimant places the veracity of Mr. Brown in question. Mr. Brown said he obtained the Starter from one Usif Buchanan in 1997, who has since migrated to England. Mr. Buchanan and himself, he said, attended evening classes at CAST in 1993. He also asserted that there used to be coincidental encounters between Mr. Buchanan and himself in Halfway Tree and it was on one of these encounters that he left the Starter with him. He further declared that he kept the Starter at his home until 1999 when he delivered it to the Claimant for its sale. I am not

convinced that this is true.

Mr. Brown further said that when he got the Starter from Mr. Buchanan it appeared to be new, yet, in cross-examination he said it was not new. He is a electrician. He would have known the difference between a used and a new Starter if he had in fact obtained one from a Mr. Buchanan. In my opinion he had never received a Starter from anyone as he alleged. I reject his evidence and conclude that he had never been in possession of a Starter, which he gave to the claimant. The defendant company owed no duty of care to the Claimant in the circumstances of this case and his dismissal was proper.

I now turn to his claim for breach of contract. A breach of an employee's contract of employment occurs where he is wrongfully dismissed before the expiration of his term of engagement. If an employee is wrongfully dismissed he may regard the contract as repudiated and recover damages for its breach. However, he would not be entitled to recover damages unless his service had been engaged for a determinable period, the dismissal takes effect before the expiration of his term of engagement and his dismissal had been without just cause.

The Claimant began his employment with the defendant company in November 1991. On October 8, 1999 a size 5 Allen Bradley Starter was found in the trunk of his car. He declared that this Starter had been given to

him by Mr. Brown. His evidence as to how he came into possession of the Starter and that of Mr. Brown have been rejected.

A Starter identical to that used by the defendant company was found in his car the very day Mr. Parkes was seen to have placed an item in it. Before the trunk was opened by him, he never disclosed the existence of the Starter upon Mr. Scott's enquiry about the contents of the trunk of the car. I am of the view that after the claimant had been apprehended with the Starter, Mr. Brown and himself concocted a story not only to deceive his employers but also the court, in an attempt to explain his custody of it.

He was interviewed by the 2nd defendant and during the course of the interview he refused to answer certain specific questions. During the interview with the 2nd defendant he gave two accounts as to the person from whom he received the equipment. Mr. Scott said when he was questioned about the Starter he also gave conflicting reports as to the origin of the Starter.

He was suspended from his employment by letters of October 11 and 19, 1999 pending investigations into the matter. After thorough investigation including the conduct of a stock enquiry status report, it was concluded that the Starter was the defendant company's property.

The Claimant was dismissed by letter of October 22, 1999. The

defendant company had treated the claimant's conduct as reason for his dismissal and had acted reasonably in doing so. It is obvious that the defendant company had just cause in terminating his employment. The defendant company is not in breach of the contract of employment.

The Claimant is not entitled to recover damages with respect to any of his claims. The Claims are dismissed. Costs to the defendants to be agreed or taxed.