



[2022] JMSC Civ 2

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2019CV05159

BETWEEN	ROMELL NEWBY	CLAIMANT
AND	SEAWIND KEY INVESTMENT LIMITED T/a Secrets & Breathless Resorts Montego Bay)	1ST DEFENDANT
AND	SHAWN MOSES	2ND DEFENDANT

IN CHAMBERS

Mrs Trudy Ann Dixon Frith instructed by Dunn Cox for the First Defendant/Applicant

Mr. Neco Pagon and Ms. Chantelle Young instructed by Aligned Law for the Second Defendant

Mr Ian Wilkinson QC and Mr Lenroy Stewart instructed by Wilkinson Law for the Claimant

Heard: 20th October 2021 and 7th January 2022

Application for Summary Judgment – CPR Rules 15.2-15.6 and 26.3

SHELLY- WILLIAMS J

Background

[1] The Claimant was hired by the First Defendant to perform duties as a butler, with the Second Defendant being his supervisor. The Claimant is no longer employed to the First Defendant.

[2] On the 31st of December 2019 the Claimant filed a Claim Form and Particulars of Claim. The Claim against the First Defendant is for wrongful dismissal, negligence and for vicarious liability in relation to the sexual harassment or assault and battery. On the 17th of December 2020 the First Defendant filed an application for summary judgement with two affidavits in support. The Second Defendant did not file an affidavit in support of the application of the First Defendant but instead indicated that they relied on their pleadings. The Claimant /Respondent filed an affidavit opposing the application for summary Judgement on the 30th of July 2021.

[3] The Notice for Application for summary judgment was made pursuant to Rules 15.2 (a), Rule 15.6 (1) and Rule 26(3) of the Civil Procedure Rules (CPR). The Applicant prayed that the Court determine the following issues:

1. Whether the Claimant's claim for wrongful dismissal is meritless as the Claimant was employed on a fixed term contract which ended due to the effluxion of time?
2. Whether the Claimant has failed to establish vicarious liability as the pleadings disclose no nexus between the injury cited and the Second Defendant committing same in the course of his employment?
3. Whether the First Defendant discharged its duty to ensure a safe working environment by thoroughly investigating the complaints by the Claimant, even after the employment contract was terminated?
4. Whether the damages sought can, as a matter of law, flow from any act of the First Defendant, as pleaded or otherwise?

The First Defendant's Submission

[4] The First Defendant submitted that the Particulars of Claim cannot sustain an actionable claim against them. They submitted that:

- a. The Claimant had been contracted pursuant to two contracts. Those contracts had expired. They indicated that there was a clause in those contracts that specifically provided for termination. Their submission is that the First Defendant had not entered into any new contract with the Claimant and as such there can be no claim against the First Defendant for wrongful dismissal. With there being no claim for wrongful dismissal, it then followed, they submitted, that no damages can be awarded for wrongful dismissal, nor can any sums be awarded for exemplary damages.
- b. They further submitted that the claim cannot be substantiated as it relates to negligence. In support of this they submitted that the only written claim relating to sexual harassment made by the Claimant was investigated. The Claimant was asked to provide evidence relating to the written complaint, which they submitted, he was unable to do. It follows, they argue, that the claim for negligence could not be substantiated.
- c. They submitted that no medical report was attached to the Particulars of Claim that would support a claim for assault and battery. There was a medical report attached to the Particulars of Claim, however, it makes no mention of any physical injuries sustained by the Claimant. They submitted that no claim can therefore be sustained for assault and battery.
- d. They further submitted that even if the Claimant has a claim for sexual harassment it would be against the Second Defendant and not the First defendant. The Claimant, they submitted, by law would be unable to prove that they were vicariously liable for the action, if any, of the Second Defendant.

Claimant/Respondent's Submission

[5] The Claimant/Respondent's Attorney, in response to this application relied on their pleadings as well as the affidavit of the Mr Newby. They submitted that: -

- a. The employment of the Claimant was not limited to the two contracts. They submitted that the Claimant had continued to work for the First Defendant after the second contract had expired. The affidavit of the Claimant alluded to certain statements made to him concerning his employment. He attached to his affidavit a letter dated the 11th of September 2017 sent to him by the First Defendant which he submitted, supports his claim that his employment had continued after the expiration of the second contract.
- b. The Claimant in support of his claim for negligence submitted that he made a number of complaints to persons in managerial and supervisory positions employed to the First Defendant about the sexual harassment he had been experiencing. He maintained that he did not have a safe working environment and that the First Defendant was negligent. He has sought support for his claim with the provisions set out in the handbook of the First Defendant which prohibits sexual harassment. He maintained that the First Defendant was vicariously liable for the acts of the Second Defendant as it related to his sexual harassment.
- c. There is an admission that there is no medical report detailing the physical injuries from the assault and battery. The Claimant has sought to explain why it was not forthcoming.

The Law

[6] The Civil Procedure Rules 2002 details a number of Rules that govern applications for summary judgement. These are Rules 15.2 (a), Rule 15. 6 (1), and Rule 26 (3). Rules 15.2 (a) and Rules 15.6 (1) speak directly to applications for summary judgments whilst the striking out of a case or part of a case is covered by Rule 26 (3). Rules 15.2 (a) and 15.6 (1) state that: -

Grounds for summary judgment

15.2 The court gives summary judgment on the claim or on a particular issue if it considers that-

- a) The claimant has no real prospect of succeeding on the claim or the issue;*

Powers of the court on application for summary judgment

15.6 (1) On hearing an application for summary judgment the court may-

- a) give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end;*
- b) strike out or dismiss the claim in whole or in part;*
- c) dismiss the application;*
- d) make a conditional order; or*
- e) make such other as may seem fit.*

Rule 26 (3) states that: -

In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –

- a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;*
- b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;*
- c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or*
- d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10.*

[7] There are a number of cases that gives guidance as to how a court should approach the issue of summary judgments. In the case of **Three Rivers District Council v Bank of England** [2001] UKHL 16 Lord Hope of Craighead at paragraph 95 of the Judgement stated that:

...it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money and it is proper that the action should be taken out of court as soon as possible. In other cases, it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all documents or other material on which it is based.

[8] In the case of **Swain v. Hillman** Lord Woolf at paragraph 94 stated that:

It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objectives contained in Part 1. It saves expense: it achieves expedition: it avoids the court's resources being used up on cases where this serves no purpose. and I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail. then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know this as soon as possible....

[9] He went on to opine at paragraph 95 that: -

The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event, a trial of the acts would be a waste of time and money. and it is proper that the action should be taken out of court as soon as possible.

[10] In the case of **Barbican Heights Limited v Seafood and Ting International Limited** [2019] JMCA Civ 1, Sinclair- Haynes JA. delivering the main judgment of

the Court of Appeal of Jamaica, referring paragraph 64 of the Commonwealth Caribbean Civil Procedure, third edition, stated the following at paragraph 78:

.....[On] *an application for summary judgment the claimant must satisfy the court of the following:*

(a) All substantial facts to the claimant's case, which are reasonably capable of being before the court, must be before the court.

(b) Those facts must be undisputed or there must be no reasonable prospect of successfully disputing them.

(c) There must be no real prospect of oral evidence affecting the court's assessment of the facts.

[11] In the Privy Council decision in the case of **Sagicor Bank Jamaica Ltd v Taylor Wright** (2018) 93 WIR 573 Lord Briggs at paragraph 21 opined that: -

The Board considers it axiomatic that, if a pleaded claim is met with a defence (whether pleaded or deployed in evidence) on a summary judgment application which, if true, would still entitle the claimant to the relief sought, then generally there cannot be a need for a trial. If the pleaded claim justifies granting the relief sought then, if the claimant proves that claim, it will succeed. If the alleged defence also justifies the relief sought, then the claimant will succeed even though the defendant proves the facts alleged in her defence. In either case, the defendant will have no real prospect of successfully defending the claim, within the meaning of Pt 15.2(b).

The rule of thumb as demonstrated in these cases is that where there is no defence to the Claimant's case, or it is clear that the Claimant's case cannot be sustained, then a summary judgement should be granted.

Wrongful Dismissal

[12] Wrongful dismissal has been defined in a number of cases. In the case of **Lindon Brown v Jamaica Flour Mills** unreported SC claim no. CL 2000/ B 199 dated

December 15, 2006, Justice Sinclair-Haynes JA, relying on the definition in Halsbury's Laws of England v. 16 4th ed., stated that: -

A wrongful dismissal is a dismissal in breach of the relevant provision in the contract of employment relating to the expiration of the term for which the employee is engaged. To entitle the employee to sue for damages two conditions must normally be fulfilled, namely:

- 1. The employee must have been engaged for a fixed period or a period terminable by notice and dismissed either before the expiration of that fixed period or without the requisite notice. as the case may be; and*
- 2. His dismissal must have been wrongful, i.e. to say without sufficient cause to permit his employer to dismiss him summarily.*

In addition, there may be cases where the contract of employment limits the grounds upon which the employee may be dismissed subject to a contractual condition of observing a particular procedure, in which case it may be argued that, on a proper construction of the contract, a dismissal for any extraneous reason or without observance of the procedure is a wrongful dismissal.

Negligence

[13] The elements that are to be proved in the tort of negligence are: -

1. the existence of a legal duty that the defendant owed to the plaintiff
2. defendant's breach of that duty
3. plaintiff's sufferance of an injury
4. proof that defendant's breach caused the injury, typically defined through proximate cause.

The Claimant is proffering in his claim that the First Defendant was negligent as he was his employer.

Vicarious Liability

[14] The Claimant further makes a claim based on vicarious liability. Sykes J, as he then was, in the case of **Allan Campbell v National Fuels and Lubricants Ltd et al** C.L. 1999/C — 262 (Nov. 2, 2004) considered the law

on vicarious liability and arrived at six principles to guide the application of the doctrine. Though not exhaustive, they are:

"68. Therefore, as far as Jamaica is concerned the proper considerations in determining whether vicarious liability should be imposed in any given situation include:

- (a) what is the duty to the claimant that the employee broke and what is the duty of the employee to the employer, broadly defined;*
- (b) whether there is a serious risk of the employee committing the kind of tort which he has in fact committed;*
- (c) whether the employer's purpose can be achieved without such a risk;*
- (d) whether the risk in question has been shown by experience or evidence to be inherent in the employer's activities;*
- (e) whether the circumstances of the employee's job merely provided the opportunity for him to commit the tort. This would not be sufficient for liability;*
- (f) whether the tort committed by the employee is closely connected with the employee's duties, looking at those duties broadly;*

69. These considerations are not exhaustive but looking at any factual situation in this way one will find both a limit to vicarious liability and a satisfactory answer in determining whether the tort committed was within the scope of his employment. The employer is not liable for any and all torts committed by the employee. "

Analysis

[15] In determining whether this is a claim in which a summary judgement can be given, I have reviewed each aspect of the claim that was filed.

Wrongful Dismissal.

[16] The First Defendant in this application submitted that the Claimant is unable to substantiate a claim for wrongful dismissal as he had been employed to the First Defendant by means of two contracts. The first contract commenced on the 1st of February 2017 and ended on the 2nd of May 2017. The second contract commenced on the 19th of May 2017 and ended on the 17th of August 2017. They submitted that one term that was included in both contracts was a termination clause that stated that:

Should your employment with Seawind Key Investments Limited, be terminated... at the end of the term specific herein, you will be terminated without notice.

[17] The First Defendant argues that the Claimant's contract had not been renewed and as such, no claim can be made for wrongful dismissal. The Claimant disagrees with this submission and argues that he was still employed to the First Defendant after the second contract had expired.

[18] In reviewing the issue of wrongful dismissal two documents were of particular interest. The first is a disciplinary form dated the 22nd of August 2017. This disciplinary form spoke of the Claimant being in the Preferred Club at Secret, long after his shift had ended. It had a section for the comments by the employee which was filled out by the Claimant. If the Claimant had not been employed to the First Defendant after the 17th of August 2017, why was this form filled out by both the First Defendant and the Claimant?

[19] The second document is a letter dated the 11th of September 2017. The letter sent by the First Defendant to the Claimant, relates to the non- renewal of the contract of the Claimant and that his final pay cheque would be sent to his account. If the second contract of the Claimant had been concluded by effluxion on the 17th of August 2017 why was this letter sent to the Claimant by the 1st Defendant on the 11th of September 2017?

[20] Whether the Claimant was still employed to the First Defendant is a triable matter. Once the issue of whether the Claimant was still employed to the defendant is decided, the court would then decide whether the Claimant was wrongfully dismissed and what, if any, damages that should be awarded.

Vicarious Liability

[21] The First Defendant has argued, that even if all that was pleaded by the Claimant in his Particulars of Claim was true, by law, those facts could not sustain a claim for vicarious liability. The Claim, for sexual harassment, they submitted, could only be made against the Second Defendant.

[22] Counsel for the Claimant submitted that they are relying on not only the terms of the contract, but also the handbook that is published by the First Defendant. This handbook, they submitted, had incorporated the principle of no sexual harassment. The Claimant is also relying on the complaints he alleges he made to persons in certain managerial and supervisory positions.

[23] Whether the Claimant can prove that he experienced sexual harassment, assault or battery, during the course of his employment for which the First Defendant is vicariously liable is a triable issue. The Claimant must appreciate the principles that must be proven to establish vicarious liability. Whether he can provide evidence to satisfy this claim is a matter for trial.

Negligence

[24] The third claim against the First Defendant is for negligence. This negligence being pursued by the Claimant includes: -

- a. a failure to provide a safe working environment,
- b. failure to implement protocols and procedure to prevent the sexual harassment of the Second Defendant,

- c. failure to investigate the claims of sexual harassment by the Claimant by the Second Defendant.

[25] The First Defendant maintains that they did not receive any credible complaints of sexual harassment and that the Claimant failed to provide evidence to support these claims.

[26] I note that although the First Defendant indicated that they had investigated the complaint of the Claimant, they have not disclosed the details of these investigations. The Claimant should be allowed to present his evidence in court and for a decision to be made at trial on this issue.

Damages for Assault and Battery

[27] Damages are being sought for assault and battery by the Claimant. No medical report relating to the physical injuries for assault and battery was attached to the claim. There is a medical report that details psychological injuries to the Claimant. Whether the Claimant can and should be awarded damages based on his medical report is a triable issue.

Conclusion

[28] The First Defendant's application for summary Judgment is refused.

[29] Cost to the Claimant to be agreed or taxed.

[30] Matter set for Case Management on the 14th February 2022 at 3 p.m. for half an hour.