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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV0155/2003

BETWEEN	SANETH WHITE	PLAINTIFF
AND	THE VICTORIA MUTUAL BUILDING SOCIETY	1ST DEFENDANT
AND	LESLIE HALL	2ND DEFENDANT

Lawton C. Heywood for Plaintiff.

Nigel W. Jones for Defendants.

Heard: 27th and 28th January, 24th February, 24th March, 25th and 28th May 2004 and 11th February 2005

Campbell, J.

On the 12th November 2002, Saneth White arrived at the car park at the Ardenne Preparatory School. She had come to collect her twin sons from that institution. Classes had just been dismissed and there were parents and children in the car park. On arrival she saw one of her sons with Neela Thompson, a co-worker from the Victoria Mutual Building Society (VMBS), where White worked. Miss Thompson is a friend of the boys' father, Mr. Moss. He had an arrangement with their mother to collect the boys that day. Moss who is also employed at VMBS had asked Miss Thompson to collect his

sons in his stead. Ms. White retrieves her son from Miss Thompson against a background of hostility and departs to collect the other child at a classroom. About fifteen minutes later when White re-enters the car park, Miss Thompson is still there. Angry words were further exchanged between the ladies, who were both dressed in VMBS uniforms. As the confrontation escalated, Ms. Thompson armed herself with a knife. A security guard on duty at the school intervened by "holding onto Ms. White".

On arrival at their work place at VMBS, Ms. White informs her supervisor of the incident. Two calls were received by Mr. Leslie Hall, Personnel Manager at VMBS, from persons who had witnessed the incident and had recognised White and Thompson, by their uniforms, as being employees of that institution.

On the 18th November 2002, a meeting was convened by Mr. Hall to inquire into the incident. Reports had previously been requested of the parties. At the end of the meeting, the Personnel Manager and his senior colleagues deliberated the matter and as a result Mr. Hall, on or about the 20th November 2002, dictated the following letter:

The Letter

"Dear Miss White,

Reference is made to submissions of reports and discussions held on Monday, 18th November 2002. This is regarding an incident (which you confirmed) that took place on Tuesday, 12th November 2002 during working hours, while dressed in uniform and at which time you were clearly identified as an employee of Victoria Mutual Building Society displaying behaviour which could bring the Society into disrepute.

As a result of the above incident, the organization has taken a decision to terminate your employment with immediate effect.

Please contact the Personnel and Employee Relations Department by 25th November 2002, to settle any outstanding financial obligations.

Yours faithfully,

Leslie B. Hall
Manager – Personnel & Employee Relations Department.

Miss Whites Claim

On 30th January 2003 Ms. White filed a particulars of claim in which she alleged, inter alia; at paragraph 3 that:

> "In consequence of the publication of the letter, to persons unknown to her, she has suffered serious damage to her character and reputation and has suffered considerable distress and embarrassment and has been unfairly dismissed from her employment."

She claims that the Defendants knew that the letter was likely to be read by employees of the various departments in the ordinary course of business and for the purposes of ascertaining the liabilities of the First Defendant to the

Claimant as it was in fact read by several persons in those departments and the contents communicated to the other employees employed in the organization, customers of the organization and other persons and companies which conduct business with the organization.

She further claims that in their natural and ordinary meaning, the said words meant and were understood to mean that the Claimant is a person who has admitted that she is guilty of criminal offences, and that is to say, assault, threatening and violent behaviour in a public place and that this behaviour is of such a serious nature that the strongest sanction of dismissal has to be imposed on her. Alternatively, the words bear that meaning by way of innuendo and were calculated and meant to disparage Ms. White in her character and behaviour.

Ms. White filed a Claim Form dated 30th January 2003 claiming

1 Damages for Defamation of character for libel contained in letter dated 20th November 2002.

2. Damages for terminating the claimant's employment with the first defendant without good and sufficient cause.

3. Damages for terminating the claimant's employment with the first defendant in breach of the provisions of the Labour Relations Code 1976 established under the Labour Relations Code 1976 established under the about Relations and Industrial Disputes Act 1975 and The Victoria Mutual Building Society's Staff Rules and Regulations.

Miss White contended that her dismissal was without good and lawful reason and in the absence of a fair and impartial inquiry of her complaint that an employee of the Society attacked her.

Defence

In their defence filed on the 18th March 2003, the Defendants denied that the words were defamatory, or were published. According to the Defendants, in their natural and ordinary meaning, the words meant and should have been understood to mean that the Claimant is a person who has admitted that she was involved in an incident which took place on 12th November 2002, and in relation to which submissions of reports were made and discussions held on Monday, 18th November 2002.

The Defendants denied that the letter could have borne the meaning advanced by the Claimant as an ordinary interpretation of what was meant in the letter is that, at the acknowledged incident, the Claimant was dressed in work uniform and was clearly identified as an employee of the Society, displaying behaviour which could bring the Society into disrepute.

The Defendants further contend that the Claimant was dismissed because she was found guilty of committing acts which amounted to gross misconduct, after a fair and impartial inquiry.

On the 2nd May 2003, the Defendants amended their defence by adding the following:

> Alternatively, the Defendants claim that the Claimant cannot make a claim for unfair dismissal by virtue of the Labour Relations and Industrial Disputes Act because the Claimant was not, at the material time, a unionised worker. The Claimant was entitled to and was given six weeks pay in lieu of notice.
>
> On the 16th June there was filed further amendment to the defence that, the letter was dictated and sent by the 2nd defendant to the relevant employees of the 1st defendant in the normal course of business. The 2nd defendant has an interest or duty in communicating the contents of the letter to those who received it.

Was there a defamation of the Claimant's character? Were the words published? If the words were defamatory and were published, is the defence of qualified privilege available to the Defendants?

The Defendant contends that there was no innuendo or ordinary meaning contained in the dismissal letter which lowered the Claimant in the eyes of right thinking persons. It was submitted on behalf of the Claimant that the words in their ordinary meaning impute the following to the Claimant:

1. That an incident took place on Tuesday, 12th November 2002 during working hours.

2. The incident was dishonourable and perhaps even criminal.

3. She was the instigator and the person who bears responsibility for the dishonourable, and perhaps criminal incident.
4. That she instigated, and thereby assumed responsibility for the incident which occurred not only during working hours but while

dressed in the well known uniform of her employer, a well known an venerable Society.

5. That the incident was characterised by a display of unacceptable behaviour of the kind which is capable of doing harm to the reputation of a prominent Society.

6. That she has confirmed the occurrence of the dishonourable incident and accepted full responsibility for it.

The Claimant further submitted that the imputations contained in the plain and ordinary meaning of the words complained of are untrue and are not findings which are supported by the facts emerging from the inquiry conducted into her complaint concerning the incident, nor can inferences in support of those imputations be made from those facts. The Claimant states that if it is determined that she is the aggressor in the incident then the finding of the inquiry must be true and the conclusion that she was guilty of misconduct was a proper finding.

Whether the letter was defamatory

The first question for the determination of the Court is whether the letter of the 20th November 2002, as a matter of law, is capable of being defamatory. If the answer to that question is in the affirmative, the Judge, when he sits alone, must decide whether the words are defamatory in the circumstances of the particular case.

In **British Guiana Rice Marketing Board vs. Peter Taylor & Co. Ltd, (1967) 11 W.I.R 208**.

> "It is well settled that the question whether a particular publication can be construed as libel is a question of law for the Judge. The question therefore for the Judge is whether the publication complained of is capable of a defamatory or libellous meaning. If the Judge so rules, it is for the jury to say whether in fact it has that meaning."

When the Judge sits alone, he performes both functions.

It is clear from the authorities that the Judge should say in what sense the ordinary reasonable man would understand that letter. The Judge would then ask himself the well-recognised test. Would the words tend to lower the Plaintiff in the estimation of the ordinary, reasonable Jamaican citizen or cause him to shun or avoid her?

The letter starts with a reference to "submission of report and discussions held on Monday 18th November 2002." This would indicate that there was a hearing of some sort held on that date. This hearing was in relation to an incident that took place on the 12th November 2004. I cannot agree that the words in bracket "which you confirm" means that the Claimant has confirmed the occurrence of a dishonourable incident and accepted full responsibility for it. The term to "displaying behaviour which could bring the society into disrepute" could encompass a wide range of actions from the actions like endorsing the action of a rival over that of the Society or

disclosing some business trait that would discredit the Society in a commercial sense, e.g., whistleblower. It could also include persons who have engaged in violent, abusive conduct and other undesirable actions. The fact that it is conduct that the Society eschews and refuses accommodation and that it warranted termination, would to my mind, cause the ordinary reader of that letter to incline to the view that the impugned conduct was something dishonourable and objectionable.

Saneth White is entitled to her good name and to the esteem of her friends and associates. She is therefore entitled to claim that her good name has been disparaged by the letter of the 12th November 2002, being published to persons without justification and excuse. It is open to the Defendants to prove the truth of the statement, and even if the Claimant suffered damage from the publication, in those circumstances, there is no remedy in law.

The Defendants have pleaded at paragraph 11 of the Defence that,

> "Any damage, distress, embarrassment or financial loss suffered by the Claimant would have been caused by the embarrassing behaviour of the Claimant."

And at paragraph 12,

> "The Claimant was dismissed because she was found guilty of committing acts which amounted to gross misconduct. Furthermore, there was a fair and impartial inquiry which served the purpose of investigating all aspects of the incident, including the Claimant's allegation that she was attacked."

The thrust of the Claimant's case was directed at establishing that she was not the instigator of the incident in the car park, and that she was there as of right to take her children from the school. It was further argued that the actions of Ms. Thompson in introducing a knife and in remaining in the car park made Thompson the instigator. Additionally, the hearing was conducted in breach of the rules of natural justice.

The Defendants sought to demonstrate the truthfulness of the defamatory letter by adducing evidence of the inquiry that preceded the publication of the letter to demonstrate there was ample evidence to support the findings of the Personnel Manager. There was evidence that a meeting was called and reports were received from the parties concerned. Questions were asked of the parties; Ms. White was present throughout the entire process. The statements were given by the main participants, Ms. White, Ms. Thompson and Mr. Moss.

It was quite clear from what was adduced at the inquiry, that Ms. White had known that the children's father had asked his friend, Neela Thompson, to collect the boys. There was ample material which the inquirer could properly find that she was angry before she arrived at the school. That the reason she was upset was because Moss' female friend would be collecting her children. On the evidence proffered, the inquirer could infer that she acted because of

jealousy and that, Moss was speaking the truth when he said that she would have reacted that way if he had asked anyone else, because she had a problem with any female with whom he associated. Evidence was forthcoming that she threatened to box Thompson and that the unseemly incident lasted for some 10 – 15 minutes. The nature of the conflict was such that it elicited the comment from one of the callers that "they were quarrelling over man."

The V.M.B.S Staff Rules and Regulations make threatening and violent behaviour an offence that may bring about dismissal of an employee. The fact of instigation is not the sole issue to be considered in determining whether either party was involved in violent and threatening behaviour. It was open to either party to withdraw at any time. Ms. White had a prior arrangement with the children's father for him to collect them. He had indicated to her that Thompson would be picking up the children because he did not have his car. When he stated that, White became irate. Later, when Thompson called him, he told the inquiry he could hear White in the background shouting. The safety of the children was never in any peril.

Certainly, what took place in the car park could amount to an affray, which is defined as "the fighting of two or more persons in a public place, to the terror of onlookers, and is a misdemeanour at common law. **Kenny's Outline of Criminal Law, Eighteenth Edition** says of the offence:

> "It has also been considered that an affray can be committed without actual violence, as appearing armed with dangerous and strange weapons such as may cause terror to people. It was enough that the disturbance was proved to be such as might intimidate or frighten reasonable people and that it was not necessary to produce a witness who could state that he personally was terrified, so long as it was established that persons appeared to be alarmed. An affray is a disturbance but a disturbance is not necessarily an affray."

Mr. Leslie Hall testified to having received a caller on the telephone, "who informed him of an outrageous incident" at Ardenne High School, which occurred before parents and children. Mrs. Kerpens–Lee told the inquiry that she had received a call from a person, who had described the incident as being disgraceful and being able to identify the persons "because of their uniforms."

The notes of the meeting state that Ms. White told the inquiry that she told Ms. Thompson to "move the phone out of my face or I will box you with it." The security guard, with whom Mr. Hall spoke, said she heard the baby-mother threaten to box the other lady. The offence in the regulations is called threatening or violent behaviour. It was clear that on the information that was available to the inquiry it was open for VMBS, to find that White's behaviour was threatening. Having so found, the words being truthful, could not mount

to a libel. The fact that persons might tend to avoid or shun her as a result of the publication, if the publication is true, is not of any consequence.

In **Winfield and Jilowicz on Tort, Twelfth Edition, by W.V.H Rogers** at page 321.

> "The Plaintiff need not prove that the statement is false, for the law presumes that in his favour. But the defendant can plead "justification" (the technical name for truth here), and if he can establish it by evidence he has a good defence though he may have been actuated by ill-will or spite. It is not that the law has any special relish for the indiscriminate infliction of truth on other people, but defamation is an injury to a man's reputation, and if people think the worse of him when they hear the truth about him that merely shows that his reputation has been reduced to its proper level."

In the event I am wrong on that point, and the words are in fact defamatory and there was no justification for their publication I should next consider the question, is the defence of qualified privilege available to the Defendants? For this defence a Defendant must show that he was under a legal, moral or social duty to communicate the defamatory matter to a third party, and that the third party had a corresponding interest in receiving it. In Adam v. Ward (1917) AC309 at page 334), Lord Atkinson said:

> "It was not disputed in this case on either side, that a privileged occasion is, in reference to a qualified privilege, an occasion where the person who makes a communication has an interest or duty, legal or social, or moral to make it to the person to whom it is made, and the person to whom it is so made, has a corresponding interest or duty to receive it. This reciprocity is

> essential. Nor is it disputed that a privileged communication – a phrase often used loosely to describe a privileged occasion, and vice versa – is a communication made upon an occasion which rebuts the prima facie presumption of malice arising from a false and defamatory statement prejudicial to the character of the plaintiff, and puts the latter on proof that there was malice in fact."

It is clear that the presence of a privileged occasion shifts to the Plaintiff the burden of proving that there was in fact malice. Was there a duty residing in the office of the personnel officer to dictate the findings of the inquiry to the secretary for transmission to the accounts department? It appears to me that there was a legal duty on the personnel officer to inform the relevant departments so that such payments that were due to the Claimant could be made. The failure of VMBS to make good all payments due to the Claimant would naturally be enforceable by an action at the suit of the Claimant. The duty on Mr. Hall is therefore a legal one. There is a corresponding duty on the recipients to receive the information.

The Claimants have challenged the defence of qualified privilege by asserting that Mr. Hall was actuated by malice, not malice implied by the publication of a defamatory statement, but an expressed malice that he abused the privilege. Additionally, the Claimant, although conceding that the Second Defendant has a duty to communicate information relevant to the status of the Claimant in relation to the First Defendant's organization to other

functionaries within the organization, the fact of dismissal is the only information which the Second Defendant needs to communicate. There was no requirement for the reason for dismissal to be communicated and equally there was no corresponding duty or interest on the part of those receiving it to do so.

The Civil Procedure Rules 69.2 provides;

> 69.2 The particulars of claim (or counterclaim) in a defamation claim must, in addition to the matters set out in Part 8 -
>
> (c) Where the claimant alleges that the defendant maliciously published the words or matters, give particulars, claim support of the allegation.

The only pleaded allegation of malice appears at paragraph 9 of the Claimant's particulars of Claim as follows:

> "The publication of the letter and dismissal of the Claimant was actuated by malice, spite and ill-will on the part of the Second Defendant towards the Claimant as it is well known within the organization that the Second Defendant was greatly embarrassed as a result of a successful protest led by the Claimant, against his decision to dismiss an employee."

There is no evidentiary support for the allegation at paragraph 9, as in cross-examination the Claimant denies that there were rumours to that effect or that her protest was well known in the organization. The other allegations were not pleaded. In an attempt to demonstrate malice in the Second Defendant, illustrations of lack sanctions in other employees who breached

the regulations were given, and prior instances of adverse comments of Ms. White by Mr. Hall was given. In relation to the incident, Ms. Thompson had resigned and Mr. Moss was admonished.

Malice is not synonymous with spite and ill will, but means an indirect motive other than a duty to publish the material of which the Complaint is raised. The test to ascertain whether malice exists is stated by Lord Diplock in Horrocks v Lowe (1972) A.C. 135, a case that concerned the use of defamatory words that the trial Judge found to have been spoken with the honest belief of their truth, but with unreasoning prejudice.

> "What is required on the part of the defamer to entitle him to the protection of the privilege is the positive belief in the truth of what he published or, as it is generally though tautologously termed, 'honest belief'."

The evidence supports the holding of this "honest belief" by the Second Defendant. The Claimant was dismissed in accordance with the VMBS Staff Orders, following an inquiry where statements were examined and the main participants allowed to give their version of the incident. Mr Hall's uncontradicted evidence was that he consulted with senior staff before the decision was taken to terminate the Claimant's employment. I find, as a matter of fact, that based on the reports and the statements made, Hall believed honestly that the Claimant was in breach of the Staff Orders.

The claim for defamation of character for libel contained in letter dated 20th November 2002, therefore, fails.

Wrongful Dismissal

Mr. Lawton Heywood, on behalf of the Claimant, submitted that she was entitled to notice, as provided by Section 3 of the employment (Termination and Redundancy Payments) Act, and that the First Defendant failed to give such notice. He further submitted that in order for a notice under S.3 of the (Employment and Redundancy Payments) Act to be valid, employee must either waive her right to notice or accept payment in lieu of notice in circumstances which demonstrate a clear intention on his part to do either.

The position at common law is stated at page 265 of the Law of Employment (8th Edition), Norman Selwyn, where it is stated:

> "An employer was entitled to dismiss an employee for any reason or for no reason at all; the only issues involved were whether or not the employee was entitled to a certain period of notice, or whether his conduct as such as to warrant instant (summary) dismissal without notice."

In **Boris J. Smith v Dominon Life Assurance Co. (1986) 23 J.L.R 329** (a decision of the Supreme Court), the Plaintiff's post, that of Sales Manager in Kingston, was to be abolished, he was offered an alternative assignment as Branch Manager in Montego Bay, his salary would be

computed on a different basis. The Plaintiff refused the assignment and his employment was terminated. Bingham, J. said at page 333:

> "In the absence of any misconduct on the Plaintiff's part, in any event, the company could only bring this contract to an end either by agreement between the Plaintiff and themselves to which the Plaintiff was a willing and consenting party or by reasonable notice in keeping with the Plaintiff's status."

The VMBS Staff Handbook provided for termination, that action being initiated at a higher level for offences that were viewed most seriously by the Society. Threatening and violent behaviour was one of the offences listed for termination. There was abundant evidence on which he could have found that the Claimant was in breach of that particular provision.

There was a complaint that the inquiry that was held into the incident was unfair. That she was not allowed to cross-examine the witnesses, was not told that she should have legal representation, and that the Personnel Officer was biased. The complainant has not alleged that she is the holder of a public office. Hers is a case of "master and servant", therefore, does not attract the rules of natural justice. Some jurisdictions have compensated for this by the enactment of statutory provisions for the protection of the worker. The Labour Relations and Industrial Dispute Act, provides grounds for unfair dismissal in respect to the unionised worker.

In **Hepple 7 O'Higgins Employment Law**, it is stated that;

> "The common law does not require the employer to follow any particular procedure in summarily dismissing an employee. Not only is there no general requirement that the employee be given a chance to be heard in his own defence, or that the rules of natural justice be complied with."

The learned authors of **De Smith's Judicial Review of Administrative Action, Fourth Edition**, page 227 states:

> "In the course of his judgement in Ridge v Baldwin, Lord Reid considered the application of the rules of natural justice to the three categories of dismissal. First, in "**a pure case of master and servant**" **dismissal was legally effective although the servant had been given no prior opportunity to be heard** but the facts might show breach of contract entitling the servant to damages. Special considerations might arise where power to dismiss a servant was fettered in certain ways. Secondly, where the occupant of an office was removable at pleasure he had no right to a prior hearing and no remedy for dismissal. Thirdly, where the occupant of an office was removable only for cause (e.g. inability or misbehaviour) he had an implied right to prior notice and opportunity to be heard." (Emphasis mine)

It was submitted on behalf of the Defendants that although the Claimant was precluded by her misconduct from alleging wrongful dismissal, the First Defendant was lenient and offered six weeks salary in lieu of notice. There was no obligation on the Defendant to pay a salary in lieu of notice.

The Claimant has accepted this sum. The fact that there was no obligation to offer notice pay, to my mind, precludes a determination as to whether six weeks was a reasonable period in the Claimant's case.

The claim for termination of the Claimant's contract without good and sufficient cause is dismissed.

Costs to the Defendants to be agreed or taxed.