[2015] JMSC Civ. 176

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO 2010HCV 04985

BETWEEN	**CHARMAINE TAYLOR**	**CLAIMANT**
AND	**BRANCH DEVELOPMENTS LIMITED**	
	t/a IBEROSTAR ROSE HALL RESORT	**DEFENDANT**

Mr. Nigel Jones and Miss Kashina Moore instructed by Nigel Jones & Co for the Claimant

Mr. Gavin Goffe and Mr. Jermaine Case instructed by Myers Fletcher & Gordon for the Defendant

Breach of Contract of Employment – Wrongful dismissal - Whether lay-off amounted to a dismissal

Defamation of Character- Whether Defendant's conduct amounted to defamation - Damages

Heard: June 15 and 16 and September 4, 2015

LINDO J. (Ag.)

[1] This is a claim by Charmaine Taylor, filed on October 8, 2010, in which she alleges that the Defendant purportedly laid her off and in effect dismissed her without offering her reasonable notice, causing her to suffer loss and damages for breach of contract and for defamation of character. The particulars of breach of contract are stated as follows:

(a) Purporting to lay off the Claimant in circumstances where the Defendant was not allowed by the relevant employment contract or the law to do so

(b) Purporting to lay off the Claimant in circumstances where none of the grounds for lay-off set out in the Employment (Termination and Redundancy Payments) Act was applicable

(c) Failed to provide the Claimant with reasonable notice…
(d) Failed to provide the Claimant with sufficient notice in lieu of dismissal…
(e) Failed to effect the dismissal via the process mentioned by the Employment Handbook….

[2] The particulars of defamation of character are itemized as follows:

a) On June 1, 2010 the Defendant informed the Claimant that she will be laid off due to their suspicion that the Claimant was involved in criminal conduct which is defamatory of the Claimant
b) The conduct of the Defendant suggests by way of innuendo that the Claimant is a criminal
c) Effecting immediate dismissal in the presence of management and staff members including Jermaine Gayle, Hopeton Cummings and Kamandi Gordon
d) Effecting lay-off without legal basis
e) Being escorted from the property by security officers
f) Being surrounded by security officers between 11:00am and 4:00pm on the date of dismissal; and
g) Being immediately replaced by new employee implying in correspondence dated August 4, 2010 …that the "lay-off" was because of the seasonal nature of the Claimant's job.

[3] The Claimant has also claimed special damages for loss of income for one year and for vacation pay for two weeks.

[4] By its defence filed on December 8, 2010, the Defendant states *inter alia*, that the Claimant was not dismissed and that it was entitled to suspend or lay-off its employees, without pay, during an investigation into misconduct, in accordance with its policies and practices.

<u>The Evidence</u>

[5] The Claimant's evidence is that she was employed with the Defendant from April 30, 2007 and the Defendant falsely accused her of being part of a group of persons who

allegedly took its liquor. She states that she was dismissed abruptly on June 1, 2010 and was not given reasonable notice. She indicates that she was not found guilty of anything and did not benefit from the Defendant's own standards set out in the Employee Handbook insofar as it sets out the procedure for disciplinary action. She states further that on being dismissed, she was surrounded by security officers and escorted off the property.

[6] In cross examination, she admitted that she was not told that she was dismissed and that at least one of the persons laid off along with her was invited to resume working with the hotel. She also stated that she did not seek to get another job immediately as she was of the view she was still employed by the Defendant and while up to September 30, 2010 she would work with the Defendant and had been waiting on them to call her, on October 1, 2010 she no longer wanted to work with the Defendant.

[7] She did not call any witnesses in support of her claim.

[8] Mr. Anthony Ferguson gave evidence for the Defendant. He states that he is the Human Resource Director and that the Claimant was called to a meeting on June 2, 2010 along with 3 other employees whom she supervised, after it was revealed that 14 bottles of liquor were found in the side panel of a commercial stove in the area she supervised. He states that all four persons were questioned and at the end of the meeting it was agreed that further investigations were required and a decision was taken to suspend the employees who were questioned, so that further investigations could be conducted. He states further that when the investigations were concluded, some employees were contacted by telephone "to be reinstated in their positions" and seven calls were made to contact the Claimant and she was contacted on September 23, 2010.

[9] Under cross examination, he said it was the policy of the Defendant to suspend an employee without pay and stated that when he said in the letter dated August 4, 2010 that the Claimant was laid off, the letter should have said "suspended".

[10] The court has to determine whether the Defendant has breached the contract of employment with the Claimant and she was dismissed, and if so, whether she is entitled

to damages for breach of contract and wrongful dismissal and whether the Defendant's conduct of having the Claimant surrounded by security guards and escorted off the property was defamatory and if so, the quantum of damages to which she is entitled.

Submissions on behalf of the Claimant

[11] Counsel submitted that the Defendant had no basis to suspend the Claimant for four months without pay as the Defendant's evidence is that it did not find her guilty of any misconduct. He noted that there is no inherent right to lay off at common law or by statute. He referred to the case of **McLean v The Raywal Limited Partnership** 2011 ONSC 7330 where Whittaker J. opined that notwithstanding the cyclical nature of the business, an employer cannot unilaterally impose a layoff unless there is a clear and valid agreement with an employee that confirms that they have the right.

[12] Counsel stated that there is no such provision in the Employment (Termination and Redundancy Payments) Act, (ETRPA) noting that it allows an employee who has been laid off for more that 120 days to give notice that he/she elects to be regarded as dismissed by reason of redundancy. He further submitted that the Claimant was not claiming that she was made redundant and there were no circumstances which would entitle the Defendant to make the Claimant redundant as a seasonal employee. He therefore indicated that the Defendant had no right to suspend the Claimant without pay.

[13] He relied on **Hanley v Pease & Partners Ltd.** [1951] KB 698 which concerned a workman who was suspended from a day's work after he absented himself from his work for one day without his employer's consent it was held that the workman was entitled to the wages he would have earned on the day he was suspended. Counsel submitted that the Claimant was entitled to damages for breach of contract and ought to be awarded damages to compensate her for the period she was prevented from working.

[14] He indicated that the Claimant's salary was $1,512,000.00 per annum (Ex. 2), and the Defendant having suspended her on June 1, 2010 and having prevented her from working even though she was willing to work up to September 30, 2010, denied

her from earning 4 month's salary so the total compensation for the period to which the Claimant is entitled is $504,000.00

[15] Counsel said that the claim for "one year's salary as damages for wrongful dismissal" was based on the fact that she claimed that she waited for the Defendant to call her and they never did, and she felt she was still employed to the Defendant and was ready to work for the Defendant up to September 30, 2010. Citing the case of **Economy Hotels Ltd v Harding** JM1997CA 16, delivered May 5, 1997, counsel indicated that the Claimant was entitled to say she had been dismissed by the Defendant based on the unfounded and indefinite layoff.

[16] He relied on the case of **General Billposting Company Limited v Atkinson** [1909] AC 118, to suggest that the Claimant was entitled to rescind the contract of employment, as the Defendant, by suspending the Claimant without any right to do so, had demonstrated that it no longer wished to be bound by the terms of the contract.

[17] He also submitted that the Claimant was entitled to reasonable notice, having been dismissed. He pointed out that the Claimant was entitled to two week's notice when employed as a Head Cook and since being promoted to a senior position which saw her receiving more than twice the pay, she had more responsibilities and was responsible for supervising a number of employees, he submitted that the period of two week's notice was unreasonable. He sought to distinguish the case of **Cocoa Industry Board and Cocoa Farmers Development Company Limited and F D Shaw v Burchell Melbourne** (1993) 30 JLR 242 noting that in that case at the date of termination, the plaintiff was in the same position as at the date of engagement, unlike the Claimant in the case at bar. He suggested that the court should find that the term of the contract incorporated in the promotion letter dated July 6, 2009 which states "[a]ll other conditions of your service remain the same" as it relates to the period of notice being two weeks, to be unenforceable.

[18] Counsel also cited the case of **Waithe v Caribbean International Airways Ltd.** (1986) 39 WIR 61, where Sir Denys Williams CJ, referring to the Canadian cases of **Bardal v Globe & Mail Ltd** 24 DLR 140 and **McGuire v Wardair Canada Ltd** 71 WWR

705, stated factors the court can consider in determining reasonable notice. These include: having regard to the character of the employment; the length of service of the servant; the age of the servant and the availability of similar employment; and the experience, training and qualifications of the servant.

[19] He noted that the Claimant in the case at bar had a senior position and rose to that position quickly, stated that she has a very specific skill set and it took her three years to get a new job, therefore one year's notice would have been appropriate and one year's salary is the appropriate award for damages.

[20] With respect to the Claimant's claim for compensation for unpaid leave, Counsel asked the court to find that the Claimant did not receive payment for unused vacation and that she is entitled to vacation pay for two weeks. He placed reliance on the decision in the Supreme Court case of **R v. Permanent Secretary Ministry of Justice Ex Parte Robinson; Robinson v Coke & Ors. [**2007] JMSC 84 delivered July 31, 2007, where the court stated that an employee is entitled to be paid for vacation time not taken, upon dismissal.

[21] In relation to the claim for damages for defamation of character, Counsel asked the court to consider the actions of the Defendant in calling the Claimant to a meeting along with other staff members and questioning them and at the end of the meeting a decision being taken to suspend all the employees who were questioned, in addition to the fact that the Claimant was escorted off the premises by security guards. He pointed out that the Defendant's witness indicated that the Claimant would have passed approximately two dozen employees to get to the exit of the property and that employees are actually escorted off the property in circumstances similar to that of the Claimant. He therefore submitted that having regard to what was known by the employees and the elements of the Defendant's conduct, there are sufficient facts to ground a claim for defamation.

Submissions on behalf of the Defendant

[22] Counsel for the Defendant submitted that the Claimant was not dismissed at all within any of the meanings specified in Section 5(5) of the ETRPA. He indicated that

the Defendant was entitled to "lay off" or "suspend" the Claimant in the circumstances and that did not amount to a dismissal. Counsel noted that the witness for the Defendant stated that it was standard practice for employees to be laid off pending investigations. He expressed the view that the Claimant cannot treat the circumstances of the case as amounting to a constructive dismissal as for this to arise the employee would have had to resign in response to the conduct of the employer which it is alleged has given rise to a breach of the contract of employment and consequently a right to the employee to treat the contract as at an end.

[23] Counsel indicated that if the Defendant was not entitled to lay off the Claimant and that resulted in the breach of her contract, she was dismissed from the moment she was laid off and therefore not entitled to any further payment of wages or she would have waived her right to treat the contract as at an end.

[24] He suggested that even if the court finds that the Claimant was wrongfully dismissed she would only be entitled to damages in the amount of the contractually agreed notice period. He referred to the Court of Appeal case of **Rosmond Baldwin v Restaurants of Jamaica t/a Kentucky Fried Chicken** [2012] JMCA Civ 13 where Brooks JA at paragraph 15 stated:

> "…*There cannot be specific performance of a contract of service and the master can terminate his contract of service with him at any time for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract.".*

[25] Referring to the case of Cocoa **Industry Board and Cocoa Farmers Development Company and F.D. Shaw v Burchell Melbourne** (supra), Counsel added that the extent of damages for wrongful dismissal where there is a termination clause in the contract is the amount that the employee would have earned for the period of notice. He therefore stated that if the court found that the Claimant was dismissed she would only be entitled to two weeks pay in lieu of notice that would have been required to terminate her employment "plus other sums due to her such as accrued and unused vacation leave payments for that period".

[26] Counsel also expressed the view that there is no basis for departing from the contractually agreed notice period as the measure of damages in this case, especially in circumstances where that notice accords with the minimum notice period under the ETRPA for a person with the years of service as the Claimant. He therefore indicated that the claim for "reasonable notice" is misplaced.

[27] With regard to the claim for breach of contract on the basis that the Defendant did not afford her the disciplinary procedures as set out in the Employee Handbook, Counsel noted that the procedures set out in Chapter VII were not applicable as Miss Taylor's suspension was not the type of disciplinary action it was meant to cover. He added that if the Claimant wanted to ventilate issues relating to the company's failure to follow its own disciplinary procedures, she could have done so under the labour relations and industrial dispute regime.

[28] Counsel for the Defendant also submitted that no claim for defamation properly arises on the facts of the case as defamation by conduct is not actionable *per se* and thus requires proof of damage. He pointed out there is no evidence of any actual damage and that the Defendant's conduct in escorting the Claimant off the property cannot be reasonably construed to mean she was guilty of an offence and thus a criminal.

[29] Counsel also added that there was no defamation in the context of any communication in the presence of staff members who were also a part of the investigative process and any such communication was covered by qualified privilege.

<u>Law & Analysis</u>

[30] Under the ETRPA, there is no provision which explicitly gives an employer the power to lay off an employee without pay for up to 120 days on disciplinary grounds.

[31] In the absence of such provision, the Canadian authority of **McLean v The Raywal Limited Partnership** 2011 ONSC 7330 referred to by Counsel for the Claimant provides some assistance. In this case, the court considered whether the Employee

Handbook layoff provisions in the Claimant's contract of employment were enforceable. The court said:

> *"In the absence of a contractual basis for layoff, the device of layoff does not exist at common law and any purported layoff will be in fact a dismissal."*

[32] In the case at bar, there is no provision in the Employee Handbook or in the written offer of employment that gives the employer the power to layoff the employee for up to 120 days. The Defendant's witness stated that it was standard practice for employees to be laid off pending investigations. The Claimant was laid off for an indefinite period and although the Defendant's evidence is that seven telephone calls were made to contact her in September with a view to having her reinstated, in keeping with the decision in **Economy Hotels Ltd. v Harding,** (supra) I am of the view that after waiting for such a long time, she was entitled to say that she had been dismissed. As such, I find that the purported layoff was unlawful and is in fact a dismissal.

[33] The Defendant's conduct amounted to a wrongful dismissal as the Claimant received no notice of her dismissal or payment in lieu of notice as set out in her employment contract. I find guidance in the decision in **Cocoa Industry Board and Cocoa Farmers Development Company and F.D. Shaw v Burchell Melbourne,** referred to by both Counsel. This case concerned an employment contract which contained express provisions regarding termination, notice and the amount to be paid in lieu of notice. The Court held that:

> *"where it is an express term of a contract that an employee who is dismissed without notice is to be paid his wages for a certain period in lieu of notice or where there is usage to that effect, the measure of damages for breach is the amount of such wages".*

[34] Section 3 of the Holidays With Pay Act speaks to the Holidays With Pay Order, paragraph 7 of which states as follows:

> *"upon termination of the employment of any worker his employer shall where that worker earned any holiday with pay which was not granted before such termination, pay him a sum equal to the holiday remuneration which would have been payable to him if all such holiday were then being granted."*

[35] The Claimant has claimed compensation for unpaid vacation leave. The sum claimed is for a period of two weeks. This has been specifically pleaded and the Defendant has not challenged the Claimant's entitlement to this. I therefore find on a balance of probabilities that the Claimant is entitled thereto and will make an award in the sum claimed.

[36] The Claimant is also entitled to damages for breach of contract due to the Defendant taking it upon itself to lay off the Claimant even though they did not have the power to do so. In the case of **Hanley v Pease & Partners Ltd.** (supra), it was held that the workman was entitled to the wages he would have earned on the day he was suspended from work.

[37] In the present case, the Claimant was suspended pending investigations into the alleged misconduct. I find that there was no contractual right to do so and notwithstanding it being a policy of the Defendant, it does not validate such an action. I find that as at the date of the suspension, the Claimant accepted that she was not dismissed. I find also that the Claimant and Defendant were treating the contract as continuing but that the Claimant was entitled to claim that she was in fact dismissed after waiting for four months to be called back to her job by the Defendant.

[38] Like the case of **Hanley**, the employer had no right to lay off and as such, this was a breach of contract which resulted in the Claimant being away from work for 120 days without pay. The Claimant was prevented from working for the period and thereby deprived of her salary. She is entitled to the sum she would have earned during the 120 day period she was "laid off" from work. I therefore find that the Claimant is entitled to the sum of $504,000.00 for breach of contract.

[39] The Claimant having been wrongfully dismissed was entitled to receive two week's notice as set out in the initial letter of employment dated April 30, 2007 and referred to in the letter dated July 6, 2009 concerning her promotion.

[40] I cannot agree with Counsel for the Claimant that having regard to the fact that the Claimant was now earning more than twice the pay and she assumed more responsibilities with the new position, the period of notice of two weeks was unreasonable. I accept that the reasonableness of the notice has to be decided based on the particular facts of this case and I have had regard to the fact that this is employment in the hospitality industry and the Claimant was employed for just over two years.

[41] There was no evidence pointing to anything exceptional about the Claimant's position in the Defendant's company or to any qualifications or experience which led to her promotion from which I can find that the period of notice was unreasonable and that a year's notice would be reasonable. I accept that if there was an intention to change the period of notice it would have been specifically stated.

[42] On this issue, I find favour with the submissions of Counsel for the Defendant that there is no basis for departing from the contractually agreed notice period as the measure of damages. I therefore find that the Claimant is entitled to be paid for two weeks. This amounts to $60,894.29.

Defamation

[43] The suspension of an employee, whether paid or unpaid, is an extremely serious measure which can cause irreparable damage to his or her reputation and standing. When this is accompanied by the action of the Defendant of having the employee escorted from the place of employment by security officers, it is potentially capable of constituting a significant blemish on the employee's employment record with consequences for his or her future career.

[44] Based on the Defendant's conduct, of having her surrounded by security guards and escorted from the property by them, the Claimant has also claimed that the Defendant has defamed her and is seeking damages for same.

[45] According to the learned authors of *Gatley on Libel and Slander*, 11th Ed. (Parkes et al. 2010) there can be defamation by conduct and in that regard state at page 91, paragraph 3.5:

> *"…Sometimes a mere act may convey a defamatory imputation, if it would be so understood by reason of a conventional meaning".*

[46] The Massachusetts High Court case of **Michael Phelan v The May Department Stores Company and Others** 60 Mass. App. Ct. 843 (2004) referred to by Counsel for the Claimant concerned a former employee of May Department Stores who sued the company for false imprisonment and defamation. The Claimant was granted damages by the jury for both claims. The jury's defamation verdict was reversed by the trial court. The Appeals Court reversed the decision of the trial court on an appeal by Mr. Phelan. The Supreme Judicial Court "SJC" on appeal from the company, held that "the conduct on which Mr. Phelan's defamation claim was predicated did not convey a clear and unambiguous false statement about him and that he had not presented any evidence that an observer interpreted the company's conduct as conveying such a meaning."

[47] In making the decision, the SJC were in agreement with May's argument that,

> *"unless the message communicated by physical conduct is unambiguous, proof of publication must include direct evidence that a defamatory message was understood by onlookers."*

[48] Additionally, in the Phelan case, the SJC concluded that the actions of the Defendants did not have a specific, obvious meaning and did not necessarily convey that Mr. Phelan had engaged in criminal wrongdoing. Mr. Phelan had the burden of proving that a reasonable person observing the security officer's conduct understood it to be defamatory. He failed to offer testimony from any observer, and therefore did not meet this burden.

[49] In this case the conduct of the Defendant, that is, having the Claimant escorted off the premises by security guards in the view of staff and guests may have suggested some wrongdoing on the part of the Claimant. It should be noted however that apart from the presence of the security guards there was no indication of any wrongdoing by the Claimant.

[50] The lack of any other evidence by the Claimant such as the use of handcuffs, may indicate ambiguity as to whether the Defendant's conduct was defamatory. Furthermore, the Claimant failed to offer testimony from any guests or staff that they understood the Defendant's conduct to be defamatory. In the absence of such evidence, I find it reasonable to conclude that there was no defamation of the Claimant's character by the Defendant's conduct.

[51] I must add at this point that I agree with Counsel for the Claimant that the Defendant is not entitled at this late stage to rely on a defence of privilege, not having pleaded it in its defence. I am guided by the decision in the case of **Abrahams v The Gleaner Company** (1994) 31 JLR 1 where the Court of Appeal stated that the Defendant must particularize the facts relied on to support the defence.

[52] Having regard to all of the foregoing, I am satisfied that the Claimant has made out a case against the Defendant as I find that the Defendant's conduct constituted a breach of contract and a wrongful dismissal, thereby making her entitled to damages. I do not find on the evidence that the Claimant has made out a case of defamation against the Defendant.

[53] There shall therefore be judgment for the Claimant against the Defendant with damages assessed and awarded as follows:

Damages for breach of contract awarded in the sum of $504,000.00 with interest at 3% from the date of service of the claim to today

Special damages awarded in the sum of $121,788.58 with interest at 3% from June 1, 2010 to today.

Costs to the Claimant to be agreed or taxed.