SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)
A.D. 1999

SUIT NO: 187 OF 1998

BETWEEN

AUSTINA FANUS

PLAINTIFF

and

DAVIE ESTATE CO. LTD

DEFENDANT

Appearances

Richard Frederick for the Plaintiff
Michael Gordon for the Defendant

FEBRUARY, 1999: 5th, 11th and 18th

JUDGMENT

Allen J in Court

The Plaintiff started work at DAVIE ESTATE in 1981 earning a salary of $300.00 per month and worked her way up the ranks to become Assistant Manager. On September 1997 when her monthly income in that capacity was $2800.00 she was dismissed in circumstances and for reasons she considered unlawful.

In this action therefore she is claiming damages for unfair dismissal as follows:

$39,000.00 for severance pay, notice pay and holiday pay

$2,800.00 per month from date of dismissal to judgement, interest on the amount awarded and costs.

The brief facts as put forward by the Plaintiff are that in her capacity as Assistant Manager she was responsible for marketing of produce and maintenance of daily records; she also did delivery, and even made roadside sales from a truck or van.

For the duration of her employment with the Defendant Company the first mention of a discrepancy came on the 9th September 1997 when she was almost nine months pregnant. In the morning of that day, she despatched a truck load of fruit and vegetables to Castries and was about to continue her daily round of duty when she was summoned to the Manager's office and questioned by himself and his wife about discrepancies between invoiced and tallied goods and the actual quantities of fruit and vegetables found on the truck, which was apparently held back by the manager for "a spot check."

The driver of the truck was also questioned, and although she thought that she had explained away the questioned discrepancies, by letter dated 11th September 1997 she was suspended from work pending investigation, and without been called upon to answer any further query, by letter dated 18th September 1997 she was dismissed from her employment.

While she was being questioned, she made this bold statement "Mr Fernand I have given the estate 16 years of loyal service and have never before been accused of anything. I would never do anything to the detriment of the estate."

During the period around which the allegations of impropriety were centered she herself was not making any deliveries because of her pregnant state. Infact it appears from the evidence that the driver

who was making deliveries at that time was able to exculpate himself when questioned, simply by saying that he delivered according to assignment because he could not read. He is still in the employment of the defendant company and doing the same job.

According to the Plaintiff she believed that her dismissal had nothing to do with her work; she gave two reasons:

(1) At the general elections held in May of that year she actively supported a different political party from the manager and his wife and in the morning after the election she was told that she was no longer welcome in the manager's office a place she had always frequented.

(2) Immediately after the elections when she was six months pregnant she was instructed by the manager's wife to go on the road and sell mangoes, and when she protested on the ground that she could not do that in her pregnant state, Mrs Fernand told her that she was lazy, that the sale of mangoes could pay her salary, and added that it was easy for her to go on the political platform, but difficult for her to do mango sales.

Under cross examination she gave an explanation for the discrepancy which as far as the manager was concerned was the main reason for her dismissal and in answer to the Court stated that she had made available to the manager the notes of her additions which showed that having weighed J Q Charles' consignment of produce in parts to avoid "squashing" she made an error in her final addition.

Mr Rolin Fernand is Managing Director of the defendant company. He employed the Plaintiff 16 years ago and never had any problem with

her until December 1996, when he reprimanded her for destroying valuable records. From then he decided to keep a closer watch over her work. He decided he would weigh all produce and reconcile them after delivery. He did so on the 2nd and 5th of September 1997 and found discrepancies in plantain, passion fruit and tomatoes on both occasions. Four days later he carried out a check in the presence of the Plaintiff and everything else reconciled except passion fruit, plantains and tomatoes consigned to J Q Charles and this was the reason why she was suspended and subsequently dismissed.

Under cross examination when it was suggested to him that the Plaintiff was still a favoured worker after burning the records he agreed that he gave her $1,000.00 at Christmas and that is only days after she had destroyed the records, but said that this was for extra work that she had done for him and not a bonus of any kind. He also agreed that a Tabulation of Produce exercise that he had carried out when his suspicions were aroused were never shown to the Plaintiff.

He agreed that during the months before dismissal of the Plaintiff she was not the one making the deliveries because she was in the later stages of her pregnancy and that the driver who made the deliveries was still in his employment.

Counsel for the Defendant submitted that the discrepancies found by the Manager were sufficient to erode his confidence in the Plaintiff; that the burden of proof on the defendant is not to prove that the Plaintiff was dishonest but merely that she had behaved in such a way as to destroy the faith of her employer in her..
He referred to the case of **SINCLAIR V NEIGHBOUR (1967) 2 Q B 279 At P289.** Where **DAVIES LJ** said:

"The judge ought to have gone on to consider whether even if falling short of dishonesty, the manager's conduct was nevertheless conduct of such a grave and weighty character as to amount to a breach of the confidential relationship between master and servant such as would render the servant unfit for continuance in the master's employment and give the master the right to discharge him immediately."

But the question even now remains, was he sure that she had committed any wrongful act?

Considering the nature of the allegations and the circumstances under which his suspicion was aroused it is difficult to understand why the manager did not see the need to explore every other probability and to allow the Plaintiff to assist him in his investigation. While I will be careful not to hold that the Plaintiff was dismissed for any political reason this dismissal coming at the time that it did, leaves many unanswered questions. It is beyond doubt that this matter warranted a thorough investigation, and to dismiss a worker who was trusted implicitly for over 16 years in this abrupt way, thereby allowing allegations whether of dishonesty or incompetence to remain as scars on her reputation at least in the manager's own mind, was grossly unfair.

Damages

Counsel for the Plaintiff after very ably conducting his case almost to the end did not assist the Court on the question of damages.

(1) His contention that the Plaintiff is entitled to severance pay is wrong. Severance pay is what is otherwise called redundancy payment and is paid ..... when an employee is dismissed by his

employer by reason of the fact that an organisation where he is so employed is closed down or re-organised or amalgamated with another organisation under a new name or change of ownership has taken place ..... CONTRACTS OF SERVICE ACT (1970) NO 14 of 1970 Sec 10.

Again the Plaintiff who was dismissed in September 1997 was about to go on maternity leave and counsel did not assist the Court as to whether under the terms of her contract, maternity leave was paid, and if so to how many months of paid leave she was entitled.

Further the Plaintiff found employment in August 1998 and no evidence was adduced to show whether this new job was commensurate with or more lucrative than the old job or perhaps just a "means to an end."

It is to counsel for the Defendant that the Court owes gratitude for whatever assistance was given on the law.

Section 6 of the Act deals with minimum periods of notice and section 7 goes on to give reasons for dismissal which shall not give rise to any liability **TO PAY WAGES** (or make payment in lieu of notice)

Then (so it would appear) the act goes silent on the subject of unfair or wrongful dismissal.

But a contract of employment is not unlike any other contract in so far as the general principles of the law of contract are concerned. A person in permanent employment who works loyally, honestly and is competent and well behaved must expect her employment to

continue indefinitely. On this expectation she may make plans for the education of her children, take a mortgage and even plan retirement strategy.

If after 16 years of loyal service she is summarily dismissed and the Court finds such dismissal to be unfair, put very simply the employer is in breach of contract.

There will be judgment for the Plaintiff in the sum of $24,000.00 made up as follows:

$4,200.00 being pay in lieu of notice and holiday pay.

$19,800.00 calculated on the basis of seven months wages for the months of January to July 1998.

Interest on this sum from the date of issue of this writ until payment at 6% per annum

Cost to be taxed if not agreed.

KENNETH ALLEN Q.C. OBE
HIGH COURT JUDGE (Ag)