BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.28 OF 2006

BETWEEN:

RAY A. GEORGE

Appellant

and

BRITISH VIRGIN ISLANDS PORTS AUTHORITY

Respondent

Before:

The Hon. Denys Barrow, SC	Justice of Appeal
The Hon. Hugh A. Rawlins	Justice of Appeal
The Hon. Ola Mae Edwards	Justice of Appeal [Ag.]

Appearances:

Mr. Lewis Hunte, QC with Ms. Nelcia St.Jean for the Appellant
Ms. Willa Liburd for the Respondent

2007: June 7;
July 2.

JUDGMENT

[1] BARROW, J.A.: This appeal against the order of the Master striking out a claim for wrongful dismissal and allowing a claim for unfair dismissal to continue calls for this court to decide what remedy is available to an employee who has been unfairly dismissed.

[2] The appellant, who was the claimant in the court below, was employed by the respondent as its managing director under a written contract of employment for a term of two years. The appointment took effect on the 1st September 2004. On 19th October 2005 the respondent served the appellant with a letter terminating his employment as managing director. The letter gave no reason for the termination.

[3] Paragraph 6 (1) of the contract of employment provided:

> "The Authority may at any time and for any reason in the absolute discretion of the Authority determine the engagement of the Employee on giving him three months notice in writing or on paying him three months' salary."

The contract also provided that the employee might determine his engagement on giving the authority three months' notice in writing.

[4] Section C55 of the Labour Code Ordinance[1] provides that an employee has a right not to be unfairly dismissed and section C57 identifies reasons that would make a dismissal not be unfair. Section C59 permits an employee who questions whether he has been unfairly dismissed to seek a resolution of the question by filing a Complaint of Unfair Dismissal with the Labour Commissioner and in subsequent provisions the procedure is laid out for the Labour Commissioner and, if necessary, the Minister to seek to achieve a voluntary adjustment or settlement of the issues raised.

[5] In March 2006 the appellant instituted proceedings against the respondent claiming damages for breach of contract and or damages for unfair dismissal. This matter came before the Master apparently on an application by the respondent to strike out the claim and the Master made an order containing, among others, the following terms; (1) that the dismissal clause in the contract of employment was valid, thus there was no breach of contract, (2) that the claim for wrongful dismissal is struck out and a claim for unfair dismissal is allowed to continue, and (3) that in order to continue the claim for unfair dismissal the claimant must follow the procedure set out in the Labour Code Ordinance.

[6] The essence of the grounds of appeal was that the master erred in finding that the termination clause in the contract of employment was valid and that there was no breach of contract. The appellant also complained that the master erred in law in failing to find that the termination clause fell below the minimum standards of employment set out in the Labour Code, which made the clause null and void and

[1] Chapter 293 of the Laws of the British Virgin Islands, R.E. 1991

the dismissal unfair. As well, the appellant complained that the Master erred in his decision to declare that an employee who was unfairly dismissed could not proceed directly to the court for relief but was obliged to follow the conciliation procedure set out under the Labour Code.

[7] In the course of argument counsel for the respondent conceded that the employee had been unfairly dismissed. She maintained, however, that the employee had been dismissed in accordance with the terms of the contract, that he had been paid the salary in lieu of notice to which he was entitled under the contract, and that there was nothing further to litigate.

[8] Queen's Counsel for the appellant submitted that the remedy available to the appellant for unfair dismissal was an award of damages quantified on the same basis as an award of damages for wrongful dismissal. In this case, Queen's Counsel submitted, the appellant would be entitled to damages in a sum equivalent to the salary for the unexpired portion of the contract of employment. Counsel further submitted that the termination clause was invalid because it provided for termination for reasons other than those which section C57 of the Labour Code said an employer may rely upon for termination. Queen's Counsel also maintained that even if the clause was valid, by giving no reason for dismissal the employer violated the clause which provided that the employer could terminate for "any reason" but did not provide that no reason could be given.

[9] The last submission is a highly legalistic one. An appropriate response to it is that the clause does not require the employer to give reasons, so the clause is not breached because the employer did not state its reason. More practically, it must follow that "any reason" includes not only particular but also general reasons, as well. A clause so widely drawn would have permitted the employer to say it has lost confidence in the employee and was terminating the employment for that reason. With such a clause it can hardly matter that no reason was given.

[10] Counsel's submission mentioned above, that the clause itself was invalid, relied on section C7 of the Code, which says that any provision in a contract of employment "which establishes conditions which fall below the minimum employment standards established" by the Code shall be null and void. Queen's Counsel submitted that the Code sets out in section C58 the conditions that must be satisfied before an employer can fairly dismiss an employee. On this submission, because the termination clause provided for dismissal for lesser reasons than those permitted in that section then the termination clause established a condition of employment that fell below the Code and was null and void.

[11] This submission fails to distinguish termination generally from termination that amounts to unfair dismissal. The reasons contained in section C58 are indeed those on which an employer may rely to dismiss without unfairness. These reasons appear in Part 5 of the Code which is headed "Unfair Dismissals". Though not articulated the premise of counsel's submission is that an employer may dismiss only for those reasons. However, dismissal for the reasons contained in section C58 is not the only dismissal that the legislation permits. Part 1 of the Code contains the provisions headed "Commencement, Elementary Requirements, And Termination of Employment" and it is in this part of the Code that is found section C7, which requires minimum conditions to be met.

[12] Section C9, contained in Part 1, sets out minimum conditions concerning notice of termination. Sub-section (1) states that an employer may terminate the employment of any person without advance notice for misconduct. Sub-section (2) provides that a person engaged for a specified term of less than one week's duration need not be given any notice of intended termination at the end of that term. According to sub-section (3) in all other cases the employer must give advance notice, depending on the status or interval between pay days of the person engaged, varying from 24 hours for workers on probation up to a maximum of 30 days for other employees. The provision in section C9 (3) (c) states that:

> "(c) in no case need the period of said advance notice exceed 30 days unless an employment contract calls for a longer notice period."

That provision settles the matter, to my mind. It specifically permits an employment contract to provide for termination by giving advance notice not exceeding 30 days. It mentions nothing about and imposes no limitation on reasons for termination. Limitations on reasons for termination, as indicated, arise only in the context of unfair dismissal.

[13] The provisions of section C11 reinforce the conclusion. These provisions require all employees, other than one proposing to quit his employment upon the expiration of a fixed term contract, to give advance notice of intention to quit. The notice periods are specified. Similarly, nothing is mentioned about giving reasons for terminating.

[14] The two sets of provisions concerning notice of intended termination, it seems to me, are the minimum employment standards established by the Code relevant to termination. Therefore, the termination clause in this case, which provided for a greater notice period than the Code required, was a perfectly valid provision of the contract. The reason for which an employer (or an employee) may terminate an employment is not an employment standard. Accordingly I see no basis for upsetting the conclusion reached by the Master that the dismissal was permitted by the termination clause in the contract and therefore the claim for damages for wrongful dismissal could not succeed.

[15] As stated, the fairness of the dismissal is a separate issue. Unfair dismissal does not exist as a concept at common law but was created and introduced into the field of employment law by statute. In **Burrell v Schneider**[2] Sir Vincent Floissac CJ explained that as a result of the provisions in the Labour Code there were now two regimes governing employment relationships and an employee was entitled to different rights under them. He said[3]:

> "At the time of the enactment of the Labour Code, an employee had a common-law right not to be wrongfully dismissed. The Labour Code did

[2] (1995) 50 WIR 193
[3] At 196 h to 197 a

> not abolish that right. The Labour Code merely supplemented that right by a statutory right not to be dismissed. …
>
> "The common law right is based on contract and the statutory right is based on social policy. The provisions of sections C57 and C58 of the Labour Code ensure that the two rights harmoniously co-exist."

[16] Thus, dismissal may be in accordance with the terms of a contract of employment and nonetheless unfair. In this case, as I have said, the respondent conceded that the appellant was unfairly dismissed. The Master ruled that the appellant was obliged to invoke the conciliation procedure for unfair dismissal that the Code provided before the appellant could proceed at law with his complaint of unfair dismissal. The appellant contends that he was not bound to follow that procedure but was at liberty, at once, to seek an award of damages in the courts. On the other hand, the respondent contends that the conciliation procedure under the Code is the sole recourse available to the appellant.

[17] In **Burrell v Schneider**[4] Floissac CJ decided the very question: what is the remedy of an employee for unfair dismissal? His Lordship stated:[5]

> "Unlike the English Employment Protection (Consolidation) Act 1978, the Labour Code provides no remedy by way of compensation for an employer's breach of his employee's statutory right not to be unfairly dismissed. The Labour Code merely provides for conciliation, which I would hesitate to classify as a remedy. Section B6 (2) (a) of the Labour Code anticipates the failure of conciliation and, in that event, provides for the remission of the issue of unfair dismissal to the parties "for the pursuit of any legal action which may be available to them"."

[18] It seems to me that decision definitively answers the question raised by and exhausts the present appeal. Under the Labour Code conciliation is the only "remedy" for unfair dismissal.

[19] The respondent cross-appealed the Master's order directing that the claim for unfair dismissal should proceed. The decision of Floissac CJ clearly confirms that the respondent is right in arguing that unfair dismissal does not give any separate

---

[4] (1995) 50 WIR 193
[5] At 198 e

cause of action for damages or any other remedy. The Master therefore erred in directing that the claim for unfair dismissal should continue. I would therefore allow the cross-appeal.

[20] The result, on my view that the appeal should be dismissed and the cross appeal allowed, would be to dismiss the entire claim and enter judgment for the respondent. I would award prescribed costs of this appeal to the respondent based on the value of the claim particularised in the Statement of Claim for $74,964.21. I calculate those costs[6] at $12,578.95.

Denys Barrow, SC
Justice of Appeal

I concur.

Hugh A. Rawlins
Justice of Appeal

I concur.

Ola Mae Edwards
Justice of Appeal [Ag.]

[6] By applying rule 65.5 and rule 65.13