

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
ST. CHRISTOPHER CIRCUIT
(CIVIL)
A.D. 2005

SUIT NO. SKBHCV 2005/0295

BETWEEN:

MAURICE LEADER

Claimant

And

ST.KITTS –NEVIS –ANGUILLA TRADING
AND DEVELOPMENT COMPANY LIMITED

Defendant

Appearances:

Mr. Glenford Hamilton for the Claimant

Mr. Charles Wilkin Q.C.and Ms. Lyn Dangler for the Defendant

2008: April 9, and 28th

JUDGMENT

[1] **BELLE J.** The determination of this matter depends largely on the interpretation of section 8(3) of the Protection of Employment Act No 6 of 1986 as amended by no. 24 of 2001 ("the Act"). Mr. Hamilton argues for the Claimant that this section gives rise to the employee's right to terminate a contract where the employer's conduct is of such a nature that the employee cannot reasonably be expected to continue his employment and any such termination shall be deemed to be termination by the employer. The event which foreshadowed the recourse to section 8 (3) was that the Claimant had been suspended without pay by the Defendant and this was not provided for in his contract of employment.

Counsel argued that this must be seen as very reprehensible behaviour based on which he is entitled to terminate the contract pursuant to section 8 (3) of the Act.

[2] Section 8 (3) of the Act states that an employee may terminate his services without notice if the conduct of his employer is of such a nature that the employee cannot reasonably be expected to continue his employment. Pursuant to subsection (4) of section 8 the employer must prove that the dismissal in the circumstances was justified. This opens the door then to the defendant to state that the Claimant was dismissed because of his conduct and that the dismissal was justified. It would seem that it is open to the Defendant to argue that its behaviour was justified even if the suspension was a breach of the Claimant's contract.

[3] At the outset the Claimant's counsel had announced that he no longer wanted to rely on the Claim relating to the demotion of his client. Thus this part of the alleged conduct leading up to the suspension though relevant is not to be taken into account in considering the application of section 8 (3). The conduct to be taken into account is solely the suspension itself. It is therefore necessary to examine the facts surrounding the suspension in detail.

The Background

[4] The Claimant stated in his evidence in chief that he was summonsed to a meeting by Mr. Clayton Douglas and that other technicians and service personnel were also present . Mr. Douglas had informed the meeting that he was now Service Manager and that he Mr. Leader/the Claimant had been relieved of his duties as Service Manager. Mr. Douglas then informed the Claimant that he was required to return the Company's laptop computer that had been given to him as Service Manager. Mr. Douglas went on to explain to him during the meeting that in future he would be detailed to the making of service calls and that he would be required to carry another technician with him whenever he proceeded to make those calls. In response the Claimant explained to Mr. Douglas that he was the most senior technician in the office and as such he did not need another technician with him

when he attended to service calls. He had not previously attended service calls with any other technician and inquired the reason for such a requirement.

[5] The Claimant contended that no reason or explanation was given in response to these inquiries and on the same day as the meeting he attended to two (2) service calls that he had been ordered to attend by himself and without an additional technician. On the 29th October he did receive correspondence demoting him from his position of Service Manager to the position of Service Specialist. As Service Specialist he was now required to report to the new Service Manager and not to the General Manager of the Department as had been the case in the past. But no job description or duties as Service Specialist were given or conveyed to him having regard to the new position.

[6] The Claimant gave evidence about his history with the company and made it appear at that time that there was no background to the events leading up to the suspension without pay. However he accepted under cross examination that there was a background which consisted of complaints and performance appraisals which pointed to his weakness as an administrator. The Claimant had in turn written a letter accepting that there was a basis for the demotion from Service Manager to Service specialist in the Business Machines Department but asked for a transfer from the Business Machines Department to the Information Services Department. Indeed there had been a meeting held on 9th September 2005 to discuss changes in the Business Machines Department. But the Claimant said he was not told what position he would be given at that meeting. The Defendant did not respond to the request to be transferred.

[7] Meanwhile I find that the Claimant did not fully accept that he had been appointed to the position of Service Specialist until he received a letter from the Defendant saying this on 29th October 2005. He did not think that this was a reply to his request for a transfer and he was upset about that.

[8] The Defendant's evidence was that on 28th October 2005 the Claimant refused to obey an instruction to go to the Scotia Bank Bird Rock work site with another technician

Mr. Saunders. Mr. Clayton Douglas explained that this instruction was given so that Mr. Saunders could get some experience in repairing the ATMs since the Claimant was the only employee at the time fully qualified to perform full service. Mr. Douglas further stated that in response the Claimant stated that he was not going along with Mr. Saunders because he works alone and further indicated and insisted that he would not be going to Scotia Bank Bird Rock Branch to repair the ATM unless he was going alone.

[9] The Claimant denied telling Mr. Douglas the Service Manager that he was not going to go out with anyone else and he stated in cross examination that he had said to the Service Manager that the other service technician who was to go out to work with him should go and do the work he had to do and he would do his two jobs. He observed that the other technician Saunders had more than two jobs to do. The Defendant also alleged that in response to an instruction to deliver his laptop computer to the General Manager the Claimant had stated that the General Manager should be man enough to come and ask for the computer himself and that he would have to remove all of his information from the computer first before handing it over to the General Manager. The Claimant did not recall saying to Mr. Clayton Douglas that Mr. Hanley should be man enough to come and ask for the computer himself. The Claimant claimed that he returned the computer the next day. The General Manager Mr. Hanley gave evidence and confirmed that he received the computer that next day but he was not aware that the Claimant had to remove personal information from the computer.

[10] I have considered this evidence of the Claimant in relation to the refusal to go to the work site with another technician and find that it is not reliable because it must have occurred to the Claimant that such an explanation would be important in clarifying his attitude towards the Service Manager's instruction. Yet there was no mention of this explanation in the Claimant's evidence in chief. The Claimant's own words in his evidence in chief were:

"I explained to Mr. Douglas that I was the most senior technician in the office and as such I did not need another technician with me if and when I attended to service calls. I also informed Mr. Douglas that previously I had not attended at service calls with any other technician and inquired the reason for such a requirement.

No reason or explanation was given to me in response to my inquiries and on the same day as the meeting I attended to two (2) service calls that I had been ordered to attend by myself and without an additional technician.”

[11] It is strange that the Claimant should adopt such an attitude to the order given when the evidence shows that he was aware since the meeting of 9th September 2005 that the Department was to be expanded and he would be the senior specialist in the Department. He would have no administrative responsibilities but he would obviously be expected to act as a leader in terms of imparting skill and knowledge. Indeed his failures at the administrative level contributed to his removal from the position of Service Manager. He accepted that he would have a different work status in that regard.

The Claimant's Demeanour

[12] When one examines the Claimant's demeanour, showing obvious signs of nervousness, long hesitations before answering questions, and frequent glances at his lawyer as if to ask for the correct answer, I find that it betrays that of an untruthful witness. I therefore prefer the Defendant's version as stated by the Service Manager Clayton Douglas in his evidence in chief. The Service Manager's version describes a scenario in which the claimant was rude and insolent when asked to return the computer to the General Manager, and disobedient and insubordinate with regard to the reasonable instructions given by the Service Manager.

[13] It is interesting that the Claimant's counsel Mr. Hamilton did not cross examine Mr. Douglas who made the damaging allegations against his client. This leaves the contradictory evidence given by the Claimant about explaining to Mr. Douglas that he should allow Mr. Saunders to do his work, and he the claimant to do his, unsupported in any way. The fact is that he did not make this statement about Saunders' work in his evidence in chief and it is not credible that such an important alleged misinterpretation by the Defendant could have been overlooked. It is therefore my conclusion that the Claimant is not telling the truth about this crucial incident leading to his suspension without pay.

[14] Indeed the evidence of Mr. Hanley seems to indicate that the Claimant went off to Nevis to a work site the very day of the instruction. He was seen in Nevis by Mr. Hanley at the ferry dock/pier. Mr. Hanley stated that management did not speak to the Claimant as part of their investigation. They recommended suspension without pay, to the Human Resources Department and the Human Resources Department agreed that the Business Equipment Department should take such disciplinary action. Thereafter the Claimant was suspended without pay for 7 days.

[15] It has not been canvassed by the Defendant that suspension without pay formed part of the Claimant's contract. The Defendant is saying that its officers suspended the Claimant with cause which would have justified dismissal. Counsel for the Claimant seemed to be arguing that the suspension letter did not set out the particulars of inappropriate conduct for which the Claimant was suspended. However the contents of the letter in my view make it very clear what the inappropriate conduct was, and goes on to plainly state that the Claimant's behaviour constituted grounds for immediate dismissal. The body of the letter reads as follows:

*"October 29, 2005
Mr. Maurice Leader
C/o TDC Business Equipment & office Furniture Department
Central Street
Basseterre*

Dear Mr. Leader,

This letter confirms your suspension from work, without pay, for the period 29 October to 4 November, for your inappropriate conduct and your failure to carry out instructions given to you on Friday 28 October 2005. You will return to work on Saturday 5 November 2005.

Further, your utterances in a department meeting held on Friday 28 October 2005 were not only inappropriate but very disrespectful to the company as a whole, to your colleagues and to me as your immediate supervisor. The behavior will not be tolerated.

We remind you that refusal to carry out instructions is considered cause for immediate dismissal.

We trust that you will use the time to contemplate the seriousness of your actions, and upon your return, we would anticipate a more professional approach from you when performing your duties.

Sincerely

ST KNA TRAD & DEV CO LTD (TDC)

*Clayton Douglas
Service Manger
TDC Business Equipment"*

- [16] The matter at hand then requires that the court address the following questions. 1. Did the defendant have grounds for summary dismissal? If it did not, could the suspension without pay be considered a repudiatory breach justifying the reliance on section 8 (3) of the Act? Can suspension without pay on such grounds be deemed reprehensible behaviour on the part of the defendant? 3. If so was the suspension to be deemed a summary dismissal? 4. How do section 5 (1) (b) and (c) relate to each other and what impact does the requirement that there be two written warning letters prior to summary dismissal have on this dismissal?
- [17] In examining these issues the court also has to determine the following legal issues:
1. Does the Defendant have an unqualified duty to pay the Claimant?
 2. Was the Claimant entitled to notice in the circumstances?
 3. Can an employer dismiss summarily for disobedience to a lawful order?
 4. Is suspension without pay necessarily a wrongful repudiation of the contract?
 5. Are the contents of section 8(3) and (4) a restatement of the law of constructive dismissal which places the burden of proof on the defendant?
 6. What is the standard of proof to be attained?"
 7. And if necessary what damages should be awarded to the Claimant for wrongful dismissal?
- [18] Counsel for the Claimant argued that the Defendant did not have the power to suspend the Claimant because there was no provision for suspension in the contract of employment. He therefore submitted that suspension in those circumstances amounts to a derogation from the contract and the employee may sue for the wages which he has lost by being suspended. In support of these submissions counsel cited **Fridman Modern law of Employment** at page 486, **Hepple & O'Higgins Employment Law (4th Edn.)** at page 217

and **Wharburton v Taft Vale Railway Co** (1920) 18 TLR 420 where Alverstone CJ is reported to have stated that the Plaintiff was in the company's service during suspension and when he was dismissed there was no rule empowering them to withhold his wages.

[19] One could glean from the comment of Alverstone CJ that the case before him was about a dismissal which occurred after a suspension without pay or where some remuneration was lost as a result. In the case at Bar counsel has invoked section 8 (3) of the Act and it is therefore presumed, taking into consideration the Defendant's concession, that the suspension itself is to be deemed a dismissal unless the defendant can prove otherwise. Whether wages are due to the Claimant would have some bearing on the issue of damages. But with respect, I do not think that Alverstone CJ's dictum takes us any further.

[20] Counsel also cited the case of **David Lashley & Partners v Bayley** (1992) 44 WIR 44. In that case a Mr. Bayley had claimed that he was wrongfully dismissed by the Appellant business and the Magistrate before whom the matter had been heard agreed that the conduct upon which the dismissal was based was not of the nature to ground a dismissal at common law. The Court of Appeal overturned this decision but held that the contract of employment in the case did not contain a right to suspend without pay. The court also observed in **David Lashley** that the respondent had indeed been paid for the period of the suspension.

[21] I do not think that the decision in **David Lashley & Partners v Bayley** is at all helpful to the Claimant. In that case after referring to the law on suspension the learned Justice of Appeal Husbands, had this to say,

"In this case, the company had no power to suspend the respondent, but the evidence discloses that the respondent was paid his wages up to the time of his dismissal. Therefore the question of payment of wages does not arise. For the purpose of this case it does not matter whether he was constructively dismissed on 6th January or by letter of 28th February. In any case, he received all of his emoluments to which he was entitled up to 28th February. The main issue therefore is whether or not the company was justified in law in dismissing the respondent."

[22] Similarly I can say that in the case at Bar the Claimant received all emoluments due to him up to the time of dismissal /suspension without pay, October 29th 2005. The issue remains, is the dismissal justified? But the circumstances in **David Lashley & Partners** are totally different and would have been more relevant had the Claimant continued to rely on the demotion as a constructive dismissal. In any event the Barbados Court of Appeal in the **David Lashley** case found in favour of the employer to the effect that the allegations made against the Claimant were sufficient to justify dismissal. It is also evident that that decision was based solely on the Common Law.

The Law

[23] However it becomes necessary to expand somewhat on the law relating to suspensions and summary dismissals. Firstly based on the evidence it is clear that the Claimant enjoyed a fixed rate of remuneration at the time of his dismissal. This was a condition of his contract which was often reaffirmed in writing when he received salary increases. There was no evidence adduced as to the right to deduct salary or to suspend. So the Defendant must be presumed to have conceded this point since he has the burden of proof on such matters pursuant to section 8 (4) of the Act.

[24] Counsel for the Defendant had wondered aloud whether it would be necessary for the Claimant to plead that his contract had been breached by the suspension. I find that based on the literal construction of section 8 (3) of the Act there would be no need to plead that there was in law a breach of contract but to plead only that the employer had taken some action which should be deemed a dismissal . It is the Defendant who would have to show that there was no dismissal or that if there was a dismissal it was justified. However if the Claimant had any peculiar knowledge of the facts he would have to plead and prove them. The answer to issue (1) is therefore, "yes."

[25] But counsel went on to argue that the suspension was such a reprehensible act that the Claimant could not be expected to continue working with the Defendant thereafter. The Act does not define in detail the kind of behaviour which is required to make an employee feel

entitled to consider the contract terminated. It is also important to note that the Act does not speak to the issue as to what happens if it turns out that the conduct did not justify a reliance on the statutory provision. Indeed an employer could sue for a breach of contract for termination without notice by the employee and then the onus would shift to the employee to show whether in the circumstances the employee could justify not giving the employer notice of termination. Section 8 (1) and (2) of the Act deal with the circumstances in which the employee is required to give the employer notice of termination.

[26] Section 8 (4) only eases the Claimant's ordinary burden of having to prove that the employer had done something wrong in the first instance. Pursuant to that provision it would be expected that the facts would explain his reasons for not giving notice to the Defendant employer.

[27] In this case there are considerable grounds to support the argument that the Defendant had good reason to discipline the Claimant. Indeed the law goes further. Counsel for the Claimant argued that the kind of serious misconduct for which summary dismissal would be justified would include fraud, dishonesty, or any other conduct of such a nature that it is unreasonable to require the employer to continue employment during the notice period, and that putting the conduct alleged against the Claimant at its highest it cannot approximate to serious misconduct.

[28] Counsel listed the allegations against his client as:

(a) his refusal to turn in the IBM laptop computer when required to do so.

(b) his statement in the presence of other employees of the Department that the General Manager should come himself and ask him for the lap top computer.

(c) his refusal to carry out the directive of the Service Manager to allow Mr. David Saunders , a senior technician to assist him to make a service call to check Scotia Bank ABM at Bird Rock , St Kitts and

(d) his statement in the presence of the other employees that he "works alone."

- [29] But the law is that the employee may be dismissed for disobedience to a lawful order of his employer. In the context of this case as was implied in the letter of suspension; the Claimant's behaviour could be considered a repudiation of the conditions of his contract of employment. The context is that the Claimant had recently become subject to the instructions of the Service Manager whose authority he apparently did not accept; and indeed he had stated in his evidence in chief that he never accepted the position of Service Specialist because he viewed it as improper and a demotion that has been made unilaterally by the company and was oppressive to him. Furthermore the Claimant appeared upset that he had not received a reply to his letter of 3rd October asking for a transfer to the MIS Department.
- [30] I hold that as a Service Specialist it could not be seen as an unreasonable order that he should work with other persons in his department in order to share knowledge and skills even if this was not specifically stated at the time of the instruction. The instructions given by the Service Manager were all reasonable and legal and should have been obeyed. The authorities which support these findings are **Laws v. London Chronicle Ltd.** [1959] 2 All E.R. 285 and **Pepper v Webb** [1969] 2 All .E.R. 216.
- [31] In **Laws v. London Chronicle Ltd.** it was held that a single act of disobedience could justify dismissal only if it was such as to show that the servant was repudiating the contract of service or one of its essential conditions as would an act of willful disobedience. In **Pepper v Webb** a case about a gardener who had become disgusted with his employer's attitude it was held that summary dismissal was justified , because the employee had repudiated his contract of service by his refusal to obey the lawful and reasonable order to put plants in, had made a statement that he did not care about the grounds and greenhouse, and his insolence to the employer.
- [32] In the case **Skinner Drilling Co. Ltd. v . Hill** 4 W.I.R , 194 circumstances arose in which the court held there was not a reasonable dismissal of the employee. But the Federal Supreme Court per Marnan J. reaffirmed the right of an employer to dismiss summarily for disobedience of a lawful instruction. It must be noted that the Defendant did not set out to

dismiss the Claimant and would not be able to prove that such was the intention. But if the law deems its act a dismissal in the circumstances based on the Claimant's election, then the Defendant must be entitled to say, it was not a dismissal, but if it were, it would have been justified and I can prove it. In my view they have done so both on the facts and law.

Constructive Dismissal with a Twist

[33] I have therefore answered the second legal issue in the negative the third in the affirmative and the fourth in the negative. As far as the issue of constructive dismissal is concerned I believe that section 8 (3) restates the Common Law position of constructive dismissal. However the cases referred to at trial do not elucidate the law on constructive dismissal in any way. It appears that certain UK, legislation of 1978 codified this approach to dismissal. In the case **Excavating (E.C.C.) Ltd v. Sharp** [1978] I.C.R. 221 in which the court examined the relevant statutory provision, it was decided that the test for constructive dismissal as so defined was a contractual one, namely whether the employer's conduct amounted to a fundamental breach or repudiation of the contract of employment. It is a mixed question of law and fact and this explains why the circumstances of the alleged repudiation are so important.

[34] Counsel made no submission as to available guidance on the issue of constructive dismissal of section 8(3) of the Act. However I find that the court has no alternative but to apply the Common Law reasoning on the issue of the kind of behaviour necessary to establish constructive dismissal since the act itself does not clearly define the kind of behaviour which would be accepted as so reprehensible or a repudiation of the contract so that the employee could consider the contract of employment terminated. Based on the decision of the Court of Appeal in **Burrill and Another v Schrader and Another** 50 WIR 193 I would have to find that there is no unequivocal language no necessary implication from the statutory context indicating a legislative intention to create a new remedy. We would therefore have to be guided by cases which point to circumstances of repudiation of contract by the employer, for guidance. I have therefore answered the legal issue number (5).

Repudiation of The Contract

- [35] The Defendant has conceded a contractual breach. But I do not think that every contractual breach necessarily provides the entitlement to bring the contract to an end. Perhaps the Claimant would have been better placed to protest the suspension without pay and ask for a hearing in which he could demand to be paid. He never raised that issue as a separate matter for consideration. I do not think that the act of suspension without pay in the circumstances of his employment should have been considered to be a dismissal and the Defendant certainly did not intend to bring the work relationship to an end. But the Defendant could have done so lawfully.
- [36] In **Chitty On Contracts Twenty Fifth Edition** Vol.2 para. 3516 page 733, the learned authors of that treatise state that it would seem that the notion that a party to a contract does not repudiate it by pursuing a bona fide but mistaken view of its effect can have only a very limited application in disputes between employer and employee over terms and conditions of employment. In the case at hand the question would be whether the mistaken view that one has a right to suspend without pay falls into the ambit of this limited application. I would answer that question in the affirmative in the circumstances of this case.
- [37] Further light is shed on this subject in the case **Mohammed Faisal Rahman v Industrial Gases Ltd** (1991) 39 WIR 390. In this case Lord Jauncey of Tullichettle speaking for Her Majesty's Board held that the suspension of the appellant in the circumstances of that case even if amounting to a breach of his contract of employment, did not amount to a repudiation of the contract as no final decision had then been taken on his future employment and at the date when he was instructed to return to work the respondents had treated the contract of employment as being still in existence.
- [38] It is my view that the **Mohammed Faisal** decision is applicable to the circumstances now before the court even though the grounds for suspension were somewhat more serious in that case. In **Mohammed Faisal's** case there was a breach of the duty of fidelity. The

employee was trading with his own company. The employer had locked out the appellant from his work site, instituted an audit and had informed him that he was suspended only after he had written asking for an explanation. In the case at Bar the Defendant only acknowledged a dismissal by letter of 8th November 2005 to Mr. Leader after the Claimant's counsel wrote to them on 7th November 2005 invoking section 8(3) of the Act and demanding damages.

The Burden of Proof

- [39] I also find that the Defendant has discharged the burden of proof imposed by section 8 (4) of the Act which although not defined would still have to be on "a balance of probabilities" even if one would expect that the Defendant would have to adduce evidence of considerable weight. I think in this case the defendant has creditably acquitted itself on the issue of the justification of the act deemed to be a dismissal and the burden of proof is adequately discharged. This covers legal issue number (6)
- [40] I have already held that the case involved a justified summary dismissal. Such a dismissal is referred to in section 5 (1) (b) of the Act. Section 5(1) (c) which carries the proviso refers to summary dismissal for incompetence and poor performance and the law both at Common Law and under the Act in that regard is that there should have been prior warnings to justify a summary dismissal. As it is stated in **Chitty on Contract 4th Edition** para 3511, an isolated act of forgetfulness or carelessness on the part of an employee will not normally entitle the employer to dismiss him without notice but this has been said to be a question of fact and degree in all cases. See: **Baster v. London & County Printing Works** [1889] 1 Q.B. 901, 903.
- [41] I am sure that the parties will agree that subsection 5 (1) (c) is not applicable to this case since the Claimant is not pursuing his action pursuant to Section 8 (3) based on the allegation of a demotion.

Conclusion

[42] I am of the view that the Defendant had just cause for summary dismissal in the circumstances. Disobedience to an order and insubordination were both present in the words stated by the Claimant at his meeting on 28th October with the Service Manager and other service technicians, as related by the Defendant, which I have accepted as fact.

[43] I do not accept that suspension without pay, deemed to be a dismissal, in the circumstances of this case, could be considered reprehensible behaviour on the part of the Defendant employer. What the employer's action shows is that its officers did not want to dismiss the Claimant. This is understandable based on the fact that the Defendant had groomed the Claimant over the years to a position of skill and responsibility. Indeed counsel for the Defendant had elicited testimony from the Claimant to the effect that the Defendant emphasizes education and training of its staff and promotes from within; the present Chairman of the company being an example of this legacy. The language of the letter of suspension which leaves it open to the Claimant to consider his behaviour during the time on suspension, also points to the fact that the Claimant's skill, experience and longstanding relationship with the Defendant were much valued. To terminate the Defendant at that time and then have to train somebody new, would probably have been considered less cost effective in the long run.

[44] In the circumstances the Claimant has failed to prove that he was wrongfully or constructively dismissed by the Defendant's conduct pursuant to Section 8 (3) of the Act. I therefore declare that he was dismissed with just cause. The Claimant's prayer for a declaration that he is entitled to notice of termination in accordance with the provisions of section 7 (1) (j) of the Act is also denied. I find for the Defendant and dismiss the claims for damages and costs. The Claimant is to pay the Defendant's costs in accordance with Part 65 of the CPR 2000.

FRANCIS H V BELLE
High Court Judge

