

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV 2008/0946

BETWEEN:

GODFREY AURELIEN

Claimant

and

JOHNY CHITOLIE
(trading as JC Trucking Bean Field in the
Quarter of Vieux-Fort in the State of Saint Lucia)

Defendant

Appearances:

Ferguson John for the Claimant
Shirley Lewis and Synther Chitolie for the Defendant

2011: May 26
July 21

JUDGMENT

- [1] **BELLE, J.:** The Claimant in his Statement of Claim alleged that he was an employee of the Defendant. The Claimant claims that the Defendant offered him the job as a truck driver in September 2002 at the rate of One hundred dollars (\$100.00) per day. Between 2002 and 2007 the Claimant says that he asked about vacation but was told that he would receive such vacation pay once another truck driver was employed.
- [2] According to the Claimant another truck driver was employed in February of 2007 but the Defendant still refused to grant him vacation leave or pay him vacation pay in lieu of the leave due. Instead in July 2007 the Defendant offered the Claimant eight days vacation but the Claimant insisted on his 13 days vacation.
- [3] On or about 13th July 2007, the Defendant informed the Claimant that he was no longer in need of his services and paid him wages amounting to one thousand (\$1000.00) dollars.

- [4] The Claimant consequently made a claim for compensation in the sum of \$6500.00 for 4 years vacation pay and 4 weeks statutory notice of termination of employment at \$500.00 per week \$2000.00, bringing the total claim to \$8500.00
- [5] In his defence the Defendant claimed that he was not at any time the employer of the Claimant. He stated that he was a driver and mechanic who was an employee of JC Trucking which was always in financial difficulty and ceased operations in or around June 2007. The Defendant, Johnny Chitolie, claimed that he had no affiliations with JC Trucking except as a driver and mechanic during the period of JC Trucking's operation.
- [6] In his evidence in chief the Claimant stated that he knew the Defendant for over thirteen years and he had been driving for over eighteen years. He said during that period he knew the Defendant to be the owner of JC Trucking. He observed that JC were the initials of the Defendant's name and he (the Defendant) always had full responsibility for JC Trucking.
- [7] The Claimant pointed out that when the Defendant approached him to work for his trucking business the Defendant never said that he needed anyone's approval to employ him. He started working the following week as requested.
- [8] His next statement was even more emphatic:
- "Throughout my period of employment I have never known anyone else as owner of the business neither have I heard anyone suggest that the Defendant was not the owner. He consistently acted as owner and never informed me or suggested that someone other than him was the owner. I was duly paid by cheque on a fortnightly basis, the cheque being signed by the Defendant. He was always my employer and that was never in dispute."*
- [9] It is evident from the line of questioning under cross-examination that the Defendant's counsel did not see it necessary to try to contradict the Claimant or show that he was lying about the identity of his former employer. Although it may have been put to him that Eugene Chitolie was his employer no great effort was made to shake the Claimant's evidence in Chief on the issue of the identity of the employer.
- [10] The Defendant's counsel instead focused on the Defendant's bad record as an employee, causing damage to the trucks and being loud, aggressive and even violent. In other words, much effort was made to establish a good cause for dismissal.

[11] In his defence the Defendant in his evidence in chief stated that Part B of the Contract of Service Act Cap 16.03 gives a number of circumstances in which a contract of service can be terminated without liability to pay wages including misconduct, wilful disobedience, repeated substantial neglect of his duties and absence from work without reasonable excuse or permission. These circumstances all apply to the Claimant's case according to the Defendant. This was obviously a legal response and not a pleading of fact.

[12] At paragraph 23 of his evidence in chief the Defendant states that the Claimant was wasting time and resources and that of the Defendant, at work. The false and misleading allegations made by the Claimant, he said, are in line with the reasons for dismissal outlined in a document he referred to as the Notice of Dismissal and Statutory Declaration. He then went further, "the Claimant has already taken good advantage of the deceased and is now seeking to gain an unfair advantage against me."

[13] He continued in paragraph 24 to state that the Claimant had a long record of gross misconduct as is shown in some documents referred to and the Claimant was acting in further support of his tactics to manipulate a situation to his advantage.

[14] Under cross examination the Defendant stated:

"I didn't deal with him I didn't deal with Godfrey Aurelien because of his attitude. When he came to bring the truck in I saw him."

[15] Later under cross examination he said:

"I don't know anything about how Mr. Aurelien left the business. I discovered documents after the death of my brother.

I didn't hire nor fire Godfrey so it is not important to me!"

[16] At the end of the cross-examination, in answer to questions from the Court related to the Claimant's alleged misconduct, the Defendant said that he knew for a fact that there was wilful disobedience, repeated substantial neglect of duty and absence from work without permission. But he offered the view at the end that the action concerned his brother and not him.

[17] It is against this background that the parties argued the issues

- (1) whether the Defendant was in fact the employer of the Claimant
- (2) If the Claimant was entitled to relief what relief would that be?
- (3) Whether the Claimant's claim for holiday pay was statute barred or prescribed?

Submissions

- [18] Counsel for the Claimant argued that the Claimant had no doubt in his mind as to who owned JC Trucking. He had known Johnny Chitolie for years had worked with him and was sure that Johnny Chitolie owned JC Trucking. It was Johnny Chitolie who had offered him the job which he accepted. It is true that he has nothing in writing but he was paid by Johnny Chitolie and had no business relationship with Eugene Chitolie the person alleged to be the Claimant's true employer.
- [19] Counsel for the Claimant submitted that the Claimant's evidence was credible. He clearly worked for JC Trucking and considered Johnny Chitolie to be his employer. On the other hand the Defendant's evidence was unreliable. He was able to give information about the company when it suited him, and knew nothing about it when it didn't suit him.
- [20] Counsel argued that the Defendant had acknowledged service of the Claim form which referred to him as JC Trucking and in answer to the question: Are your names properly stated on the claim form he stated "yes". The Defendant also agreed to mediation, the Claimant's counsel argued.
- [21] I would add that it is strange that a Defendant who apparently was trying to set up a defence of redundancy and mistaken identity, should allege in his defence that he was the mechanic of JC Trucking (the business name which did not exist), that no spare parts were provided for the maintenance of the trucks and the condition of the equipment deteriorated considerably. The trucks and equipment were continuously being sold, failing repair, until the last truck was sold in or around June of 2007.
- [22] Clearly Johnny Chitolie had a lot of intimate detail about the demise of the business JC Trucking. But there was no allegation of dismissal on the ground of misconduct in his pleaded defence. The Defendant was now bringing an entirely new case. Later however, the Defendant in evidence under cross-examination made detailed allegations of misconduct against the Defendant. I therefore agree with counsel for the

Claimant that the Defendant Johnny Chitolie's evidence is unreliable. I would say also that if indeed there were all of these incidents of misconduct the Defendant must have condoned them since he cannot state any particular incident which provoked dismissal. I simply cannot believe Mr. Chitolie and I therefore find on a balance of probabilities that he was the Claimant's employer either himself or as the partner of Eugene Chitolie and this explains his access to work performance data about the Claimant.

[23] The Defendant also relies on a number of documents to which he referred in his witness statements; however none of these documents were before the court in these proceedings. These documents were apparently exhibited for the purpose of mediation but never made their way into the trial bundle and cannot now be introduced in evidence. However even if it is to be accepted that Mr Eugene Chitolie on the books and records of the business was the Claimant's employer, the evidence shows that Mr. Johnny Chitolie at all times held himself out to be the Claimant's employer and would be considered the agent of Mr. Eugene Chitolie in the circumstances, being his brother his mechanic, his driver and the manager of his employee.

[24] The Civil Code defines agency in the following terms in Article 1601, Book Eighth Chapter First;

"Agency is a contract by which a person, called the principal, commits a lawful business to the management of another, called the agent who by his acceptance binds himself to perform it.

The acceptance may be implied from the acts of the agent, and in some cases from his silence."

[25] The agent is not personally liable when he acts in the name of his principal. See Article 1615 of the Civil Code. But when he acts in his own name he is liable. See Article 1616 of the Civil Code.

[26] I find that this definition covers the circumstances in this case. Johnny Chitolie either ran the trucking business or managed it for his brother and therefore rendered the business liable for his actions as its agent. He was also liable because he never told the Claimant that he was acting as agent for Eugene Chitolie. I believe the Claimant when he says that the Defendant acted in his own name.

[27] It is also instructive that the Holidays with Pay Act includes the agent of the employer as part of the definition of "employer."

[28] However the Defendant's counsel presents arguments in relation to the pay due to the Claimant and the holiday pay which the Claimant claimed was due to him.

[29] Counsel for the Defendant argued that the Claimant had not proved that he was paid \$100.00 per day. She relied on a document which I already observed is not part of the evidence before me. However the general principle that special damages should be specifically proved, applies. The Claimant has failed to produce any document that supports his claim to have been paid \$100.00 per month. There is no letter and no copy of a cheque. Neither is there any NIS record nor Labour Department record received after the dismissal in relation to the Claimant's wages. Accordingly this Claim fails.

[30] Counsel also argued that the Claimant could not prove the date of his employment specifically. Counsel argued that the Defendant at most would be entitled to not more than two weeks notice of termination because section 6 (3) (b) of the Contracts of Service Act states that the notice required to be given by an employer to terminate the employment of an employee who has been continuously employed under a contract of service for an indefinite period shall not be less than two weeks notice, if his /her continuous period of employment is 2 years or more but less than 5 years. The 4 weeks notice claimed by the claimant is therefore false, as the law stipulates two weeks pay only for the 4 year period of his employment. I accept that this is a correct interpretation of the law.

[31] On this point, the Defendant's Counsel is absolutely correct and therefore the Claimant's claim for 4 weeks notice fails. It is noted that on termination he was paid \$1000.00 which would meet the statutory requirement if indeed he was paid \$100.00 per day for a 5 day week.

The Limitation/ Prescription

[32] On the issue of holiday pay the Defendant argued that section 11 of the Holiday Pay Act imposes a 1 year limitation on a claim for holiday pay. However section 11 refers to the prosecution of an offence in one year. This is a civil case and not a prosecution. The submission is therefore rejected.

- [33] The Defendant also claimed prescription of claims for wages pursuant to Articles 2122 and 2123 of the Civil Code. Generally I question the Defendant's right to claim prescription at this point. Prescription should be specifically pleaded in my view. Even though the CPR 2000 does not specifically state that any limitation should be pleaded as the 1970 rules did in rule 8 (1) of Order 18, the CPR 2000 does permit the Defendant to attack the Claimant's pleadings in Part 26.3 on the basis that he has no arguable case. A matter such as a limitation or prescription should be seen as an essential aspect of the Defence or an attack on the Claimant's statement of case.
- [34] It is my view that these issues should have been sorted out at case management. This is part of the duty of the parties and their counsel pursuant to Part 1.3 of the CPR 2000 to assist the court in dealing with matters justly.
- [35] What therefore is the court to do with this revelation at this time?
- [36] I have concluded that since it is impossible for the Claimant to establish his average pay pursuant to section 5 of the Holiday with Pay Act Cap 16.11 of the Revised Laws of Saint Lucia 2001, for the purposes of a holiday pay claim without some kind of documentary evidence to support it, his claim for holiday pay must fail. It is therefore not necessary to determine whether his claim for wages would have been prescribed pursuant to Article 2122 or 2123 of the Civil Code. It seems to me however that the period of hire for the purpose of holiday pay should be determined not based on what he said, which is, \$100.00 per day, but based on the length of time he worked for the employer, as a truck driver. But there is no specific evidence of this.
- [37] The fact is that these matters could easily have been clarified on discovery. But the documents which had been exchanged at some prior date were not included in the trial bundle and were not before the court.
- [38] I therefore dismiss the Claimant's claim for four weeks pay in lieu of notice and holiday pay for 4 years as claimed.
- [39] I make no order as to costs since it is my view that a diligent prosecution of this case, in the civil sense, would have either brought the matter to an end or caused the necessary documentary evidence to be revealed and placed before the court for

adjudication purposes. Since counsel on both sides failed to act diligently I do not think that this is a matter in which costs should be awarded to either side.

Francis H V Belle
High Court Judge