

The Eastern Caribbean Supreme Court

In the High Court of Justice

Commonwealth of Dominica

DOM HCV 2004/0119

Between:

CARLISLE JNO. BAPTISTE

Claimant

and

ISLAND COMMUNICATION CORP LTD (Kairi FM)
FRANKIE BELLOT

1st Defendant
2nd Defendant

Before the Hon. Justice Brian Cottle

Appearances:

Mrs. Zena Dyer Counsel for the Claimant

Mr. McDonald Christopher Counsel for the Defendants

2011: 7th December

2012: 18th January

9th March

Judgment

[1] **COTTLE J:** The Claimant brought the present claim for damages for breach of an oral contract for employment. He says that the Defendants breached his contract by dismissing him without notice or payment in lieu thereof. The Claimant also wished to be compensated for two weeks paid vacation. In his pleadings the only term of the oral contract averred by the Claimant was the salary agreed on. There was no provision for termination by either party with or without notice. There was no pleading of an agreement for vacation leave with pay. There was no express agreement as to the length of vacation to be awarded the Claimant.

[2] The Claimant nonetheless claims for payment in lieu of notice which he says ought to be reasonable notice. In this case he fixes 6 months as a reasonable period. It is unclear why he

chooses 6 months as opposed to any other term. It is equally unclear why he fixes on 2 weeks as his vacation entitlement. The Claimant worked for 8 months until his employment was terminated

- [3] The Defendants deny that there was a contract of employment. They suggest that the Claimant provided freelance services to the Defendant and they paid him on an ad hoc basis. He was not an employee. They aver that a written contract for employment was offered but rejected by the Claimant.
- [4] The evidence led demonstrates that the position is otherwise. The Claimant was in receipt of a fixed monthly salary of \$1,200.00. Deductions were made therefrom for social security. A letter of dismissal was given to the Claimant. All of these factors lead me to conclude that the Claimant was employed by the Defendant. There was no written contract but there were no items of agreement in the oral contract as to termination or notice upon termination. There was no agreement as to vacation or the amount of vacation to which the Claimant would be entitled.
- [5] It is for the Claimant to establish his claim. I find that he has not satisfied this court about the terms of his contract alleged to have been violated. I am therefore unable to award him damages for breach of terms which have not been shown to be part of the contract of employment.
- [6] In the alternative the Claimant sought damages for breach of his statutory rights under the Protection of Employment Act Chap 89:02. Section 3 of that Act establishes a right to work. Employees are dismissible only in the circumstances laid out in the Act. The Defendants purported to act under Section 4 which permits dismissal of persons on probation for ineffectiveness. The Defendants have however failed to satisfy this court that the Claimant was on probation.
- [7] The evidence shows 8 months continuous employment before termination. That, to my mind, does not suggest a person on probation. The period is simply too long when one considers the nature of the employment as a sports and news announcer. No other grounds of termination recognized by the Act have been pleaded by the Defendants. The dismissal of the Claimant contravenes the legislative provisions.
- [8] Under part IV of the Protection of Employment Act, a mechanism is set up to enforce compliance with its provisions. A complaint is first made to the relevant minister. A copy may then be sent to the Labour Commissioner who has power to take steps to assist the parties to settle the complaint. There is established as well a Tribunal to hear and determine complaints and make orders including directions to an employer to re-instate the employee and to compel the employer to pay compensation to the affected employee.
- [9] Importantly, Section 37 gives the tribunal exclusive jurisdiction to determine all questions that arise in relation to any complaint or application made to it pursuant to the Act. Unfortunately, the Claimant has failed to avail himself of the remedies provided by the Act. Instead, some 13 months after his dismissal he opted to bring the instant claim before the High Court

- [10] What then is the effect of the Claimants failure to use the statutory regime established by the legislature? Should an aggrieved employee be allowed to ignore this mechanism and come directly to the High Court?
- [11] Counsel for the Claimant submits that a Claimant is not first bound to exhaust the procedure under The Protection of Employment Act. In support of this position counsel cites the case of Burrill v Schraider 50 WIR 193. In that case the employees sought damages for unfair or wrongful dismissal. The employees resisted on the basis that the employees had not availed themselves of the statutory regime before approaching the court for redress.
- [12] At first instance Bishop J agreed with the employers. He was overturned on appeal at the Court of Appeal. At page 200 paragraph C Sir Vincent Floissac C J (with whom Byron and Singh JJA concurred) had this to say: "I conclude that the Appellant's exhaustion of the procedure for conciliation prescribed by the Labour Code was not a pre requisite to the exercise by the Appellants of their common-law rights of access to the High Court for the purpose of procuring remedies for breaches of their common-law rights not to be wrongfully dismissed and their statutory rights not to be unfairly dismissed."
- [13] On the face of it this appears determinative of the claim under consideration yet with all due deference to an extremely strong Court of Appeal, I consider that a distinction may be drawn. Firstly there is a substantial difference between the legislation being considered in Burrill's case and the local Protection of Employment Act. The former provided for conciliation only. Sir Vincent Floissac CJ at P. 198 letter e notes that the "labour code provides no remedy by way of compensation for an employer's breach of his employee's right not to be unfairly dismissed." The learned Chief Justice was hesitant to even classify conciliation as a remedy.
- [14] The Dominica Protection of Employment Act provides for the Tribunal to have power to award compensation. The expressed ratio decidendi in Burrill's case is that a statute can only restrict a common-law right - access to the court - by clear language. The Defendant in the present case argues that there is no attempt to restrict the Claimants access to the Court to vindicate his common-law right not to be wrongfully dismissed.
- [15] The right not to be unfairly dismissed is a statutory creation. It is an expression of a social policy. In principle I see nothing wrong in saying to an employee that the Legislature has given you a new right as well as a complete statutory regime to protect that right. Before complaining to the court you should first follow that newly established procedure. This is not merely a new way of accessing redress for a common law right. It is an entirely new creature. On this basis I distinguish the present case from Burrill's case and decline to follow Burrill's case.
- [16] In the event that I am wrong in my approach I set out the facts as I have found them. The Claimant has failed to establish the terms of his contract of employment. I am unable to find for him on his claim for wrongful dismissal in breach of his contract. The Defendant has dismissed the Claimant in

breach of the Protection of Employment Act in that he has failed to establish any of the grounds set out in Part 1 of the Act as a basis for dismissing the Claimant. However I conclude that in order to obtain relief for breach of his statutory right not to be unfairly dismissed, the Claimant must first follow the procedure laid down in the Act. It is not disputed that the Claimant has in fact failed to follow the procedure established in the Act.

[17] The claim is therefore dismissed.

Costs

In the circumstances of this case having regard to the importance of the issues raised I consider it just to make no order as to costs.

Brian Cottle

High Court Judge