

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COMMONWEALTH OF DOMINICA
IN THE HIGH COURT OF JUSTICE

[CIVIL]

SUIT NO. DOMHCV2012/0300

BETWEEN:

MERVYN RIVIERE

Claimant

and

ROSS UNIVERSITY SCHOOL OF MEDICINE

Defendant

Appearances:

Dr. William Riviere Counsel for the Claimant

Mrs. Hazel Johnson of de Freitas, de Freitas and Johnson Counsel for the Defendant

2014: January 27th, 28th
and February 19th
May 9th

JUDGMENT

[1] **THOMAS, J. [Ag.]**: In this action, the claimant, Mervyn Riviere, seeks against the defendant, Ross University School of Medicine, "RUSM", a declaration and damages in these terms:

1. A Declaration that the Claimant was wrongfully dismissed;
2. Damages for breach of contract arising from wrongful dismissal;
3. Damages for breach of duty of trust and respect.

[2] The claimant's case is that by various agreements with the defendant from February 2003 he was first appointed as an Adjunct Professor and later in 2006 promoted to full-time Faculty Member at an annual salary of US\$90,000.00 with specific responsibilities.

- [3] According to the claimant “the contract agreement in 2003 and thereafter, stipulated that failure to carry out his academic duties and responsibilities at the school according to contract would be considered cause for termination in accordance with the policies and procedures established in the School’s Faculty Hand Book.”
- [4] At paragraph 19 of his statement of claim the averments go towards the termination of the claimant’s contract for serious misconduct in accordance with Section 5 of the **Protection of Employment Act.**¹
- [5] Other averments relate to the following:
1. The defendant paid the claimant his salary for the month of April 2012; and
 2. The defendant had not prior to his dismissal issued a written notice of warning to the claimant concerning his alleged misconduct and indicating the consequences of further misconduct on his part.
- [6] In the premises the claimant contends that the termination by the defendant was in breach of the rolling contract made between the claimant and the defendant for the period January 1st to December 31st, 2012 and thus constituted a wrongful dismissal. It is contended further that by reason of the wrongful dismissal the claimant has loss and damage. The particulars are:
- a) Salary and benefits payable to the claimant for the period May 1st to December 31st, 2012.
 - b) Monies due to the claimant arising from his participation in the defendant’s Deferred Compensation Plan during the years of his employment from January 1st, 2003 to April 30th 2012, and for the period of wrongful termination from May 1st to December 2012.
 - c) Monies in lieu of 18 days accrued vacation for the period, January 31st to December 31st, 2012.
 - d) The sum of US\$38,925.00, equivalent to EC\$103,151.25, representing earnings from Ross University School of Medicine Deferred Compensation Plan.
7. Further and/or other relief; and
 8. Costs

¹ Chap. 89:02 Revised Laws of Dominica

Defence

- [7] Central to the defendant's defence is the contention that the Agreement stated that it was the responsibility of the claimant to participate in those stated activities, among others, 'as required by the Executive Dean and/or the Chair of the Behavioral Science Department and in accordance with the policies established by the Faculty Handbook'.
- [8] In furtherance of the defence the defendant identifies certain episodes of conduct attributed to the claimant which are characterized as being "inappropriate, unethical and offensive and led to complaints from students". It is further contended that: "The claimant's conduct in making those statements in class, was, in the reasonable judgment of the defendant unbecoming of a Faculty Member and/or materially injurious to the interests and reputation of the defendant, and amounted to serious misconduct." A further contention is that the claimant's conduct constituted a breach of Section 2 b i F of his employment contract, and as such the termination was lawful.
- [9] Accordingly, in response to the claimant's claim that his dismissal was wrongful, the defendant denies the claim and the particulars of damages are also denied.

Reply

- [10] In his reply the claimant addresses the instances of allegations of misconduct as follows: the alleged reference to psychiatric patients as 'drooling idiots' is denied; the instance about a doctor asking a female student to guide a spectrum into her vagina but using his penis instead, the claimant says it is a true-to-life example used to stress that unethical behavior is not only unethical but also illegal; and the statement regarding medicare patients and autistic children might have been taken entirely out of context and, therefore misunderstood.
- [11] Finally, at paragraph 10 of his reply, the claimant denies that any element of his conduct in the employment of the defendant; including the allegations made by the defendant amount to serious misconduct. The claimant also avers that at the trial he will rely on Section 1.4 of the DeVry Inc Employee Handbook and on Sections 5 to 10 of the **Protection of Employment Act**.

Claimant's evidence

- [12] The claimant's evidence is confined to the witness statement of the claimant. And in his evidence he outlines his employment with the defendant from January 2002 continuously to the termination of his contract of employment on April 13, 2012.
- [13] The evidence regarding his dismissal begins in March 2012 at which time he planned to attend a conference in the United States. According to the claimant, prior to his departure he was summoned to a departmental meeting and was told that he was under investigation for unethical conduct relating to statements made while teaching. It is his further evidence that the substance of the alleged unethical conduct was not made known to him. Rather, it was suggested that he take administrative leave, which was refused. Further, still, the claimant says he was told to obtain details of the alleged unethical conduct from the school's Head of Human Resources which was done.
- [14] The claimant at paragraph 20 of his witness statement gives evidence of being summoned to a meeting with 3 officials of the school at which time "they used all manner of pressure to cause me to resign my position." The witness says he did not resign and was told that if he did not resign within 2 days his employment would be terminated for 'cause'.
- [15] Such dismissal came on April 20, 2012 after he refused to resign. It was by letter which stated that the cause of termination was serious misconduct in accordance with section 5 of the **Protection of Employment Act**².
- [16] The cross-examination of the witness centered on the complaints received from students and the manner in which such complaints were brought to the claimant's attention; the meeting with Ms. Monsanto and Dr. Raskin; the letter of dismissal and the Deferred Compensation Fund.

Defendant's evidence

- [17] The defendant's evidence is contained in the witness statements of Gannady Raskin and Yura Monsanto.

² Chap. 89:02 Revised Laws of Dominica

[18] In his witness statement, Gannady Raskin says at the time of the claimant's dismissal he held the post of Senior Associate Dean at Ross University School of Medicine.

[19] At paragraph 3 of his witness statement, the witness says that in February 2012 he received a report of a complaint by a student concerning the claimant. According to the witness, the complaint was referred to the Human Resource Director of the defendant.

[20] At paragraph 6 of his witness statement, he says that together with Dr. Abney, he met with the claimant and informed him of the complaint by the student and the fact that the matter was being investigated. The witness also says that at the meeting the claimant was given a choice of accepting administrative leave or instead of taking vacation leave.

[21] At paragraph 7 of his witness statement, the evidence reads:

"On April 11th, 2012 Ms. Yura Monsanto and I met with the Claimant. At that meeting the Claimant was informed that it was determined that his conduct was inappropriate and the defendant intended to terminate his employment. He was offered the option to resign in order to spare him the indignity of a termination. At no time during that meeting was the Claimant pressured or repeatedly called upon to resign. He was merely offered that option, which he rejected."

[22] The cross-examination of Dr. Gannaday Raskin concerned administrative leave and whether the claimant was ordered to take such leave; his responsibility for all academic activity; his powers to put a faculty member on administrative leave.

Yura Monsanto

[23] In her evidence, Yura Monsanto says she is Human Resource Director at Ross University School of Medicine.

[24] The witness gives evidence on the history of the claimant's employment at RSUM, the basis upon which the claimant's employment could be terminated under his contract of employment; the nature of complaints made against the claimant by students; the investigation into the complaints and the meeting of April 11, 2012 with Dr. Raskin, the claimant and herself at which time the claimant was informed of the defendant's intention to terminate his employment for cause; the opportunity given to the claimant to resign his post.

[25] Under cross- examination the witness gave further evidence regarding the power to dismiss and the delegation of such power to the Human Resource Manager; the hearing given to the claimant to confront the allegations; the nature of the Faculty Handbook and the DeVry Code of Conduct which are brought to the attention of all employees; and the claimant's conduct as a Professor of Ethics.

ISSUES

[26] The following issues arise for determination:

1. Whether the court has jurisdiction under the **Protection of Employment Act**³ in these proceedings.
2. Whether the defendant can rely on reports of complaints by students as RUSM without an appearance in *personam* at the hearing leading to the dismissal of the claimant.
3. Whether the claimant's employment with the defendant was wrongfully terminated.
4. Whether the claimant is entitled to the reliefs claimed.

Issue No. 1

Whether the court has jurisdiction under the **Protection of Employment Act**⁴ in these proceedings.

[27] In the Faculty Employment Agreement it is stated in Section 14 h that: "Except as otherwise provided herein, this agreement shall be governed by and construed in accordance with the Laws of the Commonwealth of Dominica without giving effect to the principle of conflicts of Laws." As such, the **Protection of Employment Act**, may or not be applicable in these circumstances.

[28] It is accepted and this court has ruled that the **Act**⁵ deals, *inter alia*, with unfair dismissal and a hearing in this connection before a public authority established by law. The further point is that the claimant seeks redress for wrongful dismissal which is a creature of common law.

³ Chap. 89:02 Revised Laws of Dominica

⁵ Op. Cit

[29] Accordingly, the court restates the rule that in this context the court is confined solely to issues of wrongful dismissal, and as such in this context the court has no jurisdiction under the **Protection of Employment Act**.

Issue No. 2

Whether the defendant can rely on reports of complaints by students at RUSM without an appearance in *personam* at the hearing leading to the dismissal of the claimant.

[30] This issue is of critical importance to the issue and as such some detailed examination becomes necessary.

[31] At paragraphs 17 and 18 of his statement of claim the following averments are made: prior to the departure for Miami, the claimant was summoned to a departmental meeting and told he was under investigation for unethical conduct relating to statements he made while teaching; the substance of the alleged unethical conduct was not made known to the claimant, instead it was suggested to the claimant that he should take administrative leave; the suggestion was refused; it was further suggested that while in Miami he should obtain the specifics from the school's Head of Human Resources; on the claimant's return to Dominica, the claimant was summoned to a meeting by the persons in administrative authority⁶ where all manner of pressure was used to cause the claimant to resign; the persons at the meeting threatened to terminate his employment for cause if he did not resign in two days; by letter dated April 20, 2012 the claimant was informed by the defendant that his employment had been terminated for cause with effect from April 13, 2012; the stated cause was 'serious misconduct' in accordance with Section 5 of the **Protection of Employment Act**; the acts constituting such misconduct were alleged to be the claimant's behavior in class.

[32] The defendant in its defence, at paragraphs 17 to 19 pleads the following: the claimant was not summoned to a meeting and the substance of the alleged conduct was not made known to him; it is denied that pressure was put on the claimant to resign; at paragraph 19 examples of the conduct relating to a class held on 8 February, 2012 are pleaded with the contention that the claimant's conduct in making the statements in class was in the reasonable judgment of the defendant

⁶ Being Human Resource Director, Acting Chair of the Department of Behavioral Sciences and the Senior Associate Dean

unbecoming of a Faculty Member and/or materially injurious to the interests and reputation of the defendant and amounted to serious misconduct.

[33] At paragraph 20 of the said defence it is pleaded that the claimant was invited to a meeting where he was informed of the complaint and that the matter was being investigated; the claimant agreed to contact and speak to Mrs. Anne Bergen-Taylor on the matter on his trip to Florida, which was done on April 2, 2012; the claimant was again invited to a meeting where the matter was again discussed with him; the claimant dismissed the complaints as misunderstandings by the students; the claimant was offered the option to resign and was informed that if he did not resign his services would be terminated; the claimant refused to resign and by letter dated April 20, 2012 the claimant's employment was terminated.

Submissions

[34] There are no submissions on behalf of the defendant, but the claimant has a number of submissions including the following:

- "6. The allegations were not put in writing by the students said to have been affected. Rather, they were stated in correspondence by one employee of the Defendant to another. Further, the supposed student complaints were not identified, including by name; two students were said to have complained. (Core Bundle, pp. 48-49).
7. The reason given by the witness YURA MONSANTO on re-examination was that students were "afraid of reprisals".
11. The Claimant requested by letter dated 22nd March 2010 that a meeting be called to enable him to completely thrash out all the allegations in the presence of the alleged complaining students. (Core Bundle, p. 50) The Defendants did not accede to this request.
18. The Claimant's testimony in response to the said allegations was not confronted by counter-evidence of the Defendant, including documentary evidence as requested by the Claimant (Judge's Bundle No. 3, p. 195)."

Conclusion

[35] It will be recalled that at paragraph 22 of his statement of claim the following is pleaded: " The Defendant had not prior to his dismissal issued a written notice or warning to the Claimant concerning his alleged misconduct and indicating the consequences of further misconduct on his part."

- [36] The court accepts the foregoing pleadings as being supported by the evidence on both sides. Further the evidence in this regard begins with an email⁷ from Barbara Harwell dated February 19, 2010 to Davendra Sharma and copied to Mary Taylor. The subject is "Dr. Riviere".
- [37] The email depicts instances of the claimant's conduct as reported by students. And when the matter arose again in 2012, the evidence which the court accepts is that the claimant was told to get details from Mrs. Taylor in Florida despite the fact that the primary recipient was Davendra Sharma. More than that, the reports had been made more than two years earlier.
- [38] In reality then, the route by which the claimant obtained verbal details of the allegations is through the Director of Human Resources in Florida and then through certain senior administrative personnel. As such it is not difficult to accept the claimant's contention that he was not given the allegations in writing.
- [39] But beyond the foregoing, it is reasonable to infer that the claimant was not able to confront the students on their allegations. With that said the reason advanced by Yura Monsanto that the students were afraid of reprisals in turn raises three issues: Firstly, the witness was not asked how she obtained this information. Secondly, that there is no evidence that the witness had any dealings with the students in this regard. Thirdly, the matter of reprisals, if credible, could have been dealt with by RUSM given the extent of its operations.⁸
- [40] The fact that Dr. Raskin and Yura Monsanto gave evidence of their interpretation of what the claimant allegedly told students cannot have any merit as the defendant's case relates to allegations by students, which Dr. Raskin and Ms. Monsanto, on the evidence are not. Nor is the defendant's case that the claimant was incompetent as Ms. Yura Monsanto contends.
- [41] The failure to provide a written statement of the allegations coupled with the absence of the alleging students leads naturally to the matter of the critical importance of common fairness to confront one's accuser: be it a court of law, a tribunal or a University concerned with rights, obligations, or discipline. Indeed, H.W.R.Wade and C. F. Forsyth, **Administrative Law**, make the point that:

⁷ Core Bundle of documents, p.p. 45-49

⁸ Mrs. Mary Taylor is Director of Human Resources, Ross University South Florida Program Office, See: Core Bundle of Documents, p. 54

"The courts have in general held that academic disciplinary proceedings require the observance of the principles of natural justice; but equally they have refused to apply unduly strict standards, provided that the proceedings are substantially fair."⁹

Conclusion

[42] It is therefore the determination of the court that the defendant cannot rely on reports of complaints by students who did not appear in *personam* at any of the hearings, the alleged complaints were not put in writing which rendered the proceedings entirely unfair and contrary to law.

[43] But if it is that the court has misguided itself on the question of the reports by students, which is the defendant's entire case; it must now consider the next issue of wrongful termination.

Issue No. 3

Whether the claimant's employment with the defendant was wrongfully terminated.

[44] There is no dispute that the claimant, by virtue of the Faculty Employment Agreement executed on 21st November, 2007 between the claimant and Ross University School of Medicine was employed as Faculty Member. The claimant was attached to the Department of Behavioral Sciences and Clinical Sciences.

[45] The Agreement contains a number of provisions, some of which are immediately relevant: These are: Term and Termination, Base Salary, Other Employment Benefits Miscellaneous, including Governing Law.

[46] It is also not in dispute that by letter dated April 20, 2012 the claimant was informed of the termination of his employment with RUSM effective April 13, 2012 for cause per Section (2 b i F) of his contract of employment and for serious misconduct in accordance with Section 5 of the **Protection of Employment Act**.

⁹ 9th ed., at page 545

Section 2 b i. F

[47] Under the heading Termination for Cause, Section 2 b i. F says this:

"i. For the purposes of this Agreement, "Cause" shall mean:

F. Conduct by the Faculty Member that, in the reasonable judgment of RUSM, is either unbecoming a faculty member of RUSM or materially injurious to the interests or reputation of RUSM.

ii. Upon the occurrence of any event of cause, RUSM shall have the right to terminate this Agreement for Cause by sending written notice to Faculty Member and the Faculty Member's employment shall immediately terminate. In such event, the Faculty Member shall receive all earned but unpaid Base Salary to the date of termination."

[48] The claimant's case is that the determination of his employment by the defendant was in breach of the contract between them and, as such his dismissal wrongful. Reliance is placed on Section 1.4 of the DeVry Inc Employee Handbook, January 2007 and the goals it sets for employees. On the other hand, the defendant says the contract of employment of the claimant provided for his immediate termination for cause. According to the express terms of the contract "Cause" includes conduct by the claimant which in the reasonable judgment of the University is either unbecoming of him or which is materially injurious to the reputation of the University.

[49] The submissions on behalf of the defendant conclude as follows:

" We submit that having regard to the undisputed evidence of Ms. Monsanto and in all the circumstances of this case, having regard to the nature of the Defendant's business of training doctors and of the position held by the Claimant, it was reasonable for the university to find that in its judgment the Claimant's conduct was unbecoming of a faculty member and injurious to the reputation of the school.

We respectfully submit that the Claimant's conduct amounted to a serious breach of contract, was inconsistent with the due and faithful discharge of his duties and sufficiently weighty to warrant summary dismissal."

Reasoning and conclusion

[50] It has already been determined that the **Protection of Employment Act** is not applicable to this case. However, a number of cases on summary dismissal and serious misconduct are also cited to the court.

[51] The basic rule on summary dismissal is that in any contract of service it can be determined upon reasonable notice.¹⁰ But in this case, by virtue of Section 2 b i F of the Agreement, a contract may be determined “immediately” once cause, as defined, exists.

[52] It has already been determined that because of a number of reasons the defendant could not rely on reports of the complaints from students plus the students did not appear at any hearing so that the claimant could question them- a breach of common fairness. And since the cause was sought to be derived from the students’ reports which the court found were nugatory, the cause does not exist for the purposes of the said Section 2 b i F of the Agreement. But the claimant was dismissed retroactively¹¹, which is not contemplated by Section 2 b i F of the Agreement or the Agreement as a whole, without cause which would render the dismissal wrongful. And as noted before, the opinions of Dr. Raskin and Ms. Yura Monsanto are irrelevant as the case the claimant faced was based entirely on the complaints from students.¹² This reasoning rests on a rule enunciated by our Court of Appeal¹³ which says that no party can enlarge its pleaded case by way of submissions and, by extension evidence.

[53] Wrongful dismissal normally attracts damages which are measured by the period of reasonable notice that is appropriate in the circumstances¹⁴. In this case summary dismissal is permissible but there must be cause, but there is none. In all the circumstances having regard to:

- a) The fact that the defendant through Dr. Paul C. Abney, Associate Professor, Acting Chair of Behavioral Services accepted the claimant’s retirement as of December 31, 2012;¹⁵
- b) The claimant’s “merit increase for the performance period ending June 30 2010”;¹⁶
- c) The “Thanks and Appreciation” from Sandra Edmee, on departing 4th Semester,¹⁷

The court determines that the usual measure of damages must be the salary and benefits the claimant would have earned up to December 31, 2012, in accordance with the contract, less the

¹⁰ See: Kenrick Ambo v Dominica Air and Seaports Authority, Suit No. DOMHCV2010/0297, at paras. 113 and 114

¹¹ The termination letter is dated April 20, 2012 but the termination took effect from April 13, 2012.

¹² See: Core Bundle of Documents, pp. 48, 49 & 54

¹³ See: Jacqui Quinn Leandro v. Dean Jonas, HCVAP2/018-020 per Rawlings CJ

¹⁴ Kenrick Ambo v Dominica Air and Seaports Authority, Suit No. DOMHCV2010/0297. See: A.I. Ogus, The Law of Damages, p. 283 at seq.

¹⁵ Core Bundle of Documents p. 53

¹⁶ Op. Cit, p. 52

¹⁷ Op. Cit, p. 47

amount paid to him on termination. This would put the claimant in the position he would be in but for the breach. By implication, the court does not accept the submission on behalf of the defendant that damages should not exceed six months salary.

Issue No. 4

Whether the claimant is entitled to the reliefs claimed.

[54] The reliefs sought by the claimant have already been identified and must now be dealt with *seriatim*.

a) Salary and benefits payable to the claimant for the period May 1st to December 2012.

This has already been determined in the claimant's favour.

b) Monies due to the claimant arising from his participation in the defendant's Deferred Pension Plan during the years of his employment from January 1st 2003 to April 30, 2012 and for the period of wrongful termination from May 1st to December 2012.

d) The sum of US\$38,925.00 equivalent to EC\$103,151.25 representing earnings from Ross University School of Medicine Deferred Compensation Plan.

[55] In this connection the court accepts the evidence that these matters are handled by a separate legal entity. That entity is not a party to these proceedings and hence the question of the court's lack of jurisdiction prevails.

Damages for breach of trust and confidence

[56] This head of damages is not new as it is well established. However, as with other heads of damages the supporting evidence must be adduced.

[57] Learned counsel for the claimant cites the authorities of **Bliss v South East Thames Regional Health Authority**¹⁸ and **Woods v. W. M. Car Services Limited**¹⁹ and then tenders the following submissions:

"The Defendant's veto of the Claimant's participation in the aforementioned Bioethics Planning Conference in the U.S.A., combined with attempts by the Defendant's employees to force the Claimant to resign, had the effect of harming

¹⁸ [1987] I. C.R. 700

¹⁹ (1982) I.C.R. 693

relations between the parties and causing the Claimant to lose the confidence he had placed in the Defendant.

Accordingly, it is submitted that the Defendant breached the duty of trust, respect and confidence it owed to the Claimant by virtue of its Employment Agreement with the Claimant."

[58] Learned counsel for the defendant has cited the case of **Cecillia Deterville v. Foster & Ince Cruise Services**²⁰ in support of her opposition to the award. In particular the following reasoning is cited:

" [E]ven if the Claimant was able to prove the allegation of breach of trust and confidence she would not be able to prove consequential loss beyond the ordinary payment of pay in lieu of notice. She is not able to prove any loss from stigma resulting from the employer's breach of trust and confidence nor the manner of dismissal as a result of the breach of trust and confidence term of her contract.

In my view the Claimant has failed to prove any unduly harsh treatment by the employer or any consequential loss other than that which flows from loss of employment."

[59] Learned counsel for the defendant submits, based on the authority cited that the claimant has not provided evidence as to any loss suffered beyond the normal loss resulting from his loss of employment that would allow the court to make an award in his favour.

Conclusion

[60] The court agrees with the submissions on behalf of the defendant and rules accordingly that the claimant has not satisfied the court in terms of evidence to show loss suffered.

Costs

[61] The claimant is entitled to prescribed costs based on the total damages awarded.

²⁰ SLUHCV2009/0811

ORDER

[62] IT IS HEREBY ORDERED AND DECLARED as follows:

- [1] The court has no jurisdiction under the **Protection of Employment Act** given the fact that the claimant is seeking redress from wrongful dismissal at common law.
- [2] The defendant cannot rely on the reports of complaints by students at Ross University School of Medicine because:
 - (a) The reports were sent to several persons by persons other than the students, before the claimant was informed orally,
 - (b) The claimant was never given a written statement of the complaints prior to his dismissal,
 - (c) The fear of reprisals by students cannot be an issue given the extended operation of Ross University School of Medicine in Florida.
- [3] While the defendant has power to terminate immediately for cause, in the claimant's case the defendant lacked cause within the meaning of Section 2 b i F of the Faculty Employment Agreement plus the termination was retroactive which is not provided for in the said section or in the Agreement as a whole.
- [4] The claimant is entitled to salary and benefits payable for the period May to December 2012.
- [5] The evidence establishes that the Ross University Deferred Pension Plan is administered by a separate legal entity which is not a party to these proceedings and as such this court has no jurisdiction to consider the reliefs sought in this connection.
- [6] The claimant has failed to adduce evidence to show that he suffered damages as a result of breach of trust and confidence.
- [7] The claimant is entitled to prescribed costs based on the total award of damages.

Errol L. Thomas
High Court Judge [Ag]