

**IN THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT
IN THE HIGH COURT OF JUSTICE**

NEVHCV2021/0074

BETWEEN:

KAINO JONES

Claimant

v

S.L. HORSFORD AND COMPANY LIMITED

Defendant

Appearances:

Mrs. M. Angela Cozier for the Claimant

Mr. Damian Kelsick K.C. and Ms. Chante Francis for the Defendant

2023: September 28

2024: February 12

JUDGMENT

THOMPSON JR J:

- [1] In or about November to December of 2020 the Defendant company (“Horsford’s”) had a problem. The problem was this. Their Nevis branch only had 3 loaner vehicles in stock. Loaners are vehicles which are lent to customers while their vehicle is being repaired by Horsford’s. Horsford’s are in the vehicle sales business so that even loaners could be sold.
- [2] . Of the three loaners, one was sold to X. Another was sold to Y. A Ms. Z saw the final loaner and wanted to purchase it. She said as much to the Claimant, who was the Car Sales Assistant Manager at Horsford’s in Nevis. She came with a check to purchase the vehicle, but the Claimant did not accept Ms. Z’s check nor give the vehicle to her. The sale was delayed and eventually Ms. Z grew tired of the Claimant’s explanations for why she could not have the vehicle. She complained to someone else who brought the matter to the attention of the Claimant’s bosses in St Kitts.
- [3] Mrs. Natalie Kelsick Marshall (Horsford’s Executive Director with responsibility for the automotive division) called Mr. Jones in early January 2021. Both Mrs. Marshall and Mr. Jones agreed that there was a heated conversation between them, and that Mrs. Marshall asked Mr. Jones if he knew how

to do his job. Mrs. Marshall then spoke with Mr. Jones' immediate supervisor in St Kitts, a Mr. McEachrane. She then spoke with a member of Horsford's Board of Directors and on the following day (January 26, 2021), Mr. Jones was served a letter.

[4] The letter is important and is set out below:

"Dear Mr. Jones,

Management is extremely disappointed that you were implicated in the recent acts of gross mismanagement during your employment as the Assistant Manager, Automotive at S.L. Horsford Nevis Ltd. Your infractions are listed as follows:

1. Withholding a company vehicle for sale without authorization in December 2020.
2. Issuing a pro forma invoice for the same vehicle to a customer without completing return to stock procedure. Vehicle was due to return to stock in October 2020.
3. Replacing 4 tires on the same company vehicle totaling \$2,328.08 on 6th January 2021 without authorization.
4. Performing a diagnosis on the same company vehicle with a third-party mechanic without authorization on 21st January 2021.
5. Performing a repair to same company vehicle totally (sic) \$1,748.21 with a third-party mechanic without authorization on 21st January 2021.
6. Abandoning on duty foreman while performing work in Nevis on Saturday 16th January.
7. Declining sales performance over the last three years.

Mr. Jones, management questions your integrity, loyalty and work ethics. Your behavior goes against company policies. You were issued a written warning on 8th January 2020 for similar infractions, and it was clearly stated that any re-occurrence of the same nature would result in immediate termination. Therefore, we are forced to terminate your services with S.L. Horsford Nevis Ltd effective January 26, 2021, for serious mismanagement.

The enclosed cheque for \$7,465.08 represents the total monies to which you are entitled and was calculated as per the attached sheet.

Yours faithfully
S.L. Horsford & Co Ltd

Natalie Kelsick Marshall
Executive Director"

[5] The letter summarily terminated Mr. Jones' employment and enclosed a check in the sum of \$7,465.08 representing 2 months' pay in lieu of notice. This sum was precisely what Mr. Jones was

entitled to under his contract of employment¹ with Horsford's since he had been employed with them since September 11th, 2015.

- [6] Mr. Jones was aggrieved by the letter and sought and obtained legal advice. He sought and obtained legal advice and initiated these proceedings seeking damages for his wrongful dismissal. Mr. Jones' lawyers submitted that he was entitled to damages in the sum of his monthly salary² for each month that he was terminated until the date of trial. They thus sought the sum of \$100,606.92 as damages for what they say was Horsford's wrongful breach of their client's contract of employment.
- [7] Horsford's position was a two pronged one. Firstly, they contended that they did not summarily terminate the Claimant but that they had terminated his employment in accordance with the law. Mr. Kelsick K.C. submitted that Section 7(2) of the Protection of Employment Act provided for two months' pay in lieu of notice for an employee in Mr. Jones's position. In his view, Mr. Jones could have no complaint as he received the requisite statutory pay in lieu of notice and further submitted that the statute did not provide that any reason had to be provided for dismissal.
- [8] In support of his submissions, Mr. Kelsick K.C. relied on the reasoning of Mr. Justice Mitchell (as he then was) in the case of **Sonia Hamilton v Colonial Life Insurance Company (Trinidad) Ltd, Claim No. SKBHCV2001/0113** in the following terms:

"[7] The first question that the court must answer is whether Mrs. Hamilton was wrongfully dismissed. There is a Protection of Employment Act in force in the Federation. That Act, among other things, sets out a minimum period of notice of termination that must be given to an employee. An employer cannot contract out of that minimum period... [8] The law of the Federation does not require a reason to be given for dismissal. No reason for the dismissal was given about which Mrs. Hamilton can complain. It was a brutal dismissal, coming as it did when she had just returned from sick leave. But, it was not legally wrongful..."

- [9] Therefore, Mr. Kelsick K.C. argued that his primary submission was entirely dispositive of Mr. Jones's case. All the same, Mr. Kelsick K.C. further submitted that it did not matter that the letter characterized the reasons for Mr. Jones's dismissal as 'serious mismanagement' or 'serious misconduct'. It was Horsford's argument that the common law provided that summary dismissal can be justified by facts ascertained by the employer after the dismissal and on grounds differing from those alleged at the time of the dismissal.
- [10] Horsford's relied on **Boston Deep Sea Fishing and Ice Co v Ansell (1888) 39 ChD 339** where the Court of Appeal held that the receipt of a secret commission by the Respondent was a good ground for his dismissal from employment even when that secret commission was not discovered until after dismissal had taken place and might have been an isolated act. The reasoning of Russell LJ in **Cyril Leonard & Co v Simo Securities Trust Ltd [1971] 3 All ER 1313** at 1320– 1321 in the following terms lends further support to Horsford's position.

¹ "an employee paid on a monthly basis who has completed 5 years but less than 10 years ten years continuous service, two months." – per contract letter dated September 11, 2015.

² \$3,275.00

“Apart from authority, I myself would take the view that, if the manager had before the alleged premature determination of the contract been guilty of conduct such as would deprive him of the right to insist on the contractual provision for notice to determine, it would be quite wrong, when that conduct is proved in an action for wrongful dismissal, that he should succeed in that action on the ground that the other party had not known enough about his misdeeds when he determined the contract.”

- [11] This argument elegantly sidestepped the question of whether the grounds set out in the letter amounted to grounds for summary termination and sought to rely on the matters raised in Horsford’s counterclaim as an ex post facto justification for Mr. Jones’ dismissal.
- [12] In response to Mr. Jones’ claim, Horsford’s also counterclaimed for the sum of \$47,712.65, being the value of parts missing from the department that Mr. Jones was supervising during his tenure there. Prior to trial they provided details of these losses and at a pre-trial review hearing on July 26th, 2023, Horsford’s were ordered to provide and did provide a further and legible copy of a spreadsheet outlining the details of the missing items to Mr. Jones’s lawyers on August 23rd, 2023.
- [13] The law on this issue is clear and well settled. Section 7 of the Protection of Employment Act sets out the relevant notice periods on termination of employment. A person in Mr. Jones’ situation in view of his tenure with Horsford’s was thus entitled to 2 months’ salary in lieu of notice. Once Horsford’s complied with what the law required there was no basis upon which Mr. Jones’ claim for 33 months’ salary as damages was sustainable. Quite why this approach was persisted with when the statute is clear was mystifying.
- [14] Moreover, there was no argument from Mr. Jones’s lawyers that he did not receive the vacation pay due to him and his lawyers did not seek specific disclosure from Horsford’s of any bonuses which their client lost because of his employment being terminated. Their failure to do so was even more surprising, since at trial counsel reminded this court that they had acquired considerable experience in labour law matters. A careful review of the pleadings and evidence does not indicate any bonus which was paid to Mr. Jones during his employment or any basis upon which any bonus could be calculated. There was thus no basis upon which this court could assess for itself what, if anything, was lost by Mr. Jones as bonuses. Additionally, this court was disinclined to acquiesce to any suggestion that it could simply pluck a figure out of the air without more on this issue.
- [15] If therefore there is no entitlement to damages of the kind sought by Mr. Jones, this Court does not need to grapple with the sufficiency of the reasons advanced by Horsford’s for summarily terminating Mr. Jones’ employment.
- [16] All the same and out of an abundance of caution, this Court is satisfied that the principles of law set out in Boston Deep Sea Fishing and Ice Co v Ansell and Cyril Leonard & Co v Simo Securities Trust Ltd confirm that Mr. Jones’s proven misconduct in relation to the sums claimed under the counterclaim provide a complete answer to the Claimant’s position. Simply put, the Defendant did not know of the irregularities in the Claimant’s department. Once they had performed an audit and became aware of their losses, they filed a counterclaim to that effect. The evidence of Devaundre Maynard, discussed in more detail below, leads to the inference that Mr. Jones had dealt with Horsford’s property as though it was his own. In those circumstances, there could be no real

argument that the failure to account for \$47,000 worth of stock would not amount to grounds for summary dismissal.

- [17] As a result of this finding, this Court does not have to determine the adequacy of the reasons set forth in the letter of January 26, 2021. As a matter of law, the issue of whether any alleged misconduct was sufficiently grave to amount to a repudiation of the employee's contract of employment is a question of fact in each case. This question of fact depends on the circumstances of the case, the nature of the employment and the particular contract in question. In this regard, previously decided cases may be of limited value since attitudes to misconduct may have changed over time. The value to be derived from the Victorian³ and Edwardian⁴ era are of dubious value since the employer/employee relationship was often analyzed through a master/servant lens. For reasons that do not require elaboration, that analysis is not transposable to the modern era.
- [18] All the same, items 3 to 5 of the letter of January 26, 2021, refer to the expenditure of Horsford's monies without authorization. The use of company resources strikes at the very heart of the trust and confidence essential in the employer/employee relationship, but it is an open question (which this court does not have to decide in these proceedings) as to whether those acts, whether by themselves or cumulatively warranted summary dismissal of the Claimant.
- [19] Mr. Jones's evidence at trial was contained in a perfunctory, 2 ½ page, 18 paragraph witness statement that did not join issue in any detailed way with the case for Horsford's. Mr. Jones seemed to be of the view that his lawyer's letter in response to Horsford's letter put matters to rest. This was a misguided tactic since it meant that there was no evidence from Mr. Jones of what happened to the loaner. Quite why this material was not set out in a detailed fashion in his witness statement is a mystery. The letter from the Claimant's lawyer to Horsford's was dated February 4, 2021. The Claimant's witness statement was filed on March 31, 2022. There has been no reasonable explanation for why the detail included in response to the termination letter was not included or foreshadowed or elicited in the Claimant's evidence at trial.
- [20] Additionally, the Claimant's response to the Defendant's counterclaim left a lot to be desired. On at least 3 separate occasions the Claimant's answer to a question in amplification about the counterclaim was that he had 'no idea what this was about'. The Claimant's case on the counterclaim seemed to be that Horsford's had essentially produced this audit of his department after he had left and as such, he did not have an opportunity to offer any comments on it.
- [21] This argument ignores the following facts. Firstly, there is no evidence that the Claimant attempted to instruct any accountant, forensic or otherwise, to challenge Horsford's audit. Secondly, it was not put to Horsford's employees at trial that the audit was thus fraudulent and even if it had been put there was a need for some factual basis for such an assertion. The Claimant's counsel made a fair point on the independence of the Horsford audit since their audit was internal, but this point only underscores the need for the Claimant's counsel to seek an expert opinion on this issue. Simply saying that the audit was not independent and as such this court could not rely on it was manifestly inadequate.

³ 1837-1901

⁴ 1901-1914

- [22] Thirdly, since August 23, 2023, the Claimant was served with a fully legible copy of the details of the Horsford audit and their findings. It was thus open to the Claimant and his counsel to either instruct their own auditor from the time they were served with the counter claim or seek the opinion of an auditor so that they were armed with the material to cross examine Horsford's accountant on this issue. They did neither.
- [23] Finally, the evidence of Devaundre Maynard put the Claimant in an invidious position. Mr. Maynard worked with Mr. Jones in the department and his unchallenged evidence was clear. According to Mr. Maynard, during his time at Horsford's 'he realized that Mr. Jones wasn't doing certain things the way they should be done'. These things included making promises to customers that were not company policy, painting a company vehicle without permission and critically using the stock count system as a guide so that the stock would not be off. According to Mr. Maynard, on one occasion, Mr. Jones sold an ac compressor for less than full price and upon further investigation the said compressor was not brought back to stock.
- [24] Mr. Maynard's cross examination was surprisingly brief and no issues about the stock count or the compressor were raised with him. Essentially, his cross examination was geared at clarifying the history of what happened with the loaner vehicle. Maynard's evidence, once accepted, was damning evidence. His evidence would have confirmed that Mr. Jones would have acted irresponsibly in relation to Horsford's property. Therefore, it was more surprising that no factual challenge to Mr. Maynard's evidence was put to him in cross examination. The effect of the failure by Mr. Jones' lawyers to challenge this evidence meant that Mr. Jones was content to accept Mr. Maynard's evidence with full awareness of the likely consequences and inferences which were reasonably open to this court.
- [25] The Defendant's called several witnesses at trial in support of their defence and counterclaim. None of Ms. Liburd, Ms. Charles, Mr. Maynard, Mr. McEachrane nor Mrs. Kelsick Marshall were shaken in cross examination by the Claimant's counsel. Much heavy weather was made of the circumstances of the loaner, but the specifics of the Claimant's case were not put to the Defendant's witnesses. Ms. Liburd's evidence that the digital inventory system formed the basis for the findings of her audit and that there was no evidence that employees were not using the digital inventory system further emphasized the strength of the Defendant's counterclaim. Critically, Ms. Liburd's evidence that Mr. Jones's department contained two other subordinates meant that he was ultimately responsible for the stock count discrepancies that were revealed. In any event, there was no attempt to place the blame for those discrepancies at the feet of anyone which weakened the possible inferences open to this court on this issue. The foregoing all confirm that the Claimant failed to discharge the legal and evidential burden of proving his case to the requisite standard. The Defendant managed to do so on their counterclaim and is thus entitled to judgment in their favour since they successfully resisted the Claimant's claim and succeeded on their counterclaim.
- [26] The parties were allowed to address the court on the import of the recent Privy Council decision of Bertrand v Elias [2023] UKPC 34 on the issue of costs and were content that prescribed costs applied since this was the default position unless some other order was warranted.

[27] Therefore, the Claimant's claim against Horsford's fails and Horsford's are entitled to their prescribed costs of defending this claim. Horsford's counterclaim against the Defendant succeeds and Mr. Jones is ordered to pay the sum of \$47,712.65 on the counterclaim together with prescribed costs in the sum of \$13,420.00 thus totaling \$61,132.62.

**Patrick Thompson Jr
Resident High Court Judge**

BY THE COURT

REGISTRAR