

THE EASTERN CARIBBEAN SUPREME COURT

SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SVGHCV 2009/172

BETWEEN:

MICHELLE JONES

Claimant

AND

THE SAINT VINCENT AND THE GRENADINES PORT AUTHORITY

Defendant

Appearances: Mr. Emery Robertson for the Claimant
Mr. Grahame Bollers for the Defendant

2013: July 2

2014: August 20

JUDGMENT

- [1] **THOM J.:** Ms. Michelle Jones was employed by the Saint Vincent and the Grenadines Port Authority (the Port Authority) from 7th May 2007 as a receptionist. She was placed on probation for a period of six (6) months. On November 13, 2007 her appointment was confirmed.
- [2] The terms of the agreement provided for Ms. Jones to be paid a salary of EC\$1,117.00. The terms and conditions of employment contained in the Memorandum of Agreement between the Port Authority and the National Workers Movement (The Memorandum of Agreement) were incorporated into Ms. Jones terms of employment. Ms. Jones was also to be guided by the Port Authority Staff Rules and Regulations.
- [3] On the 27th February 2008 while at work, Ms. Jones fell and was injured. She was taken to the Milton Cato Memorial Hospital and she was subsequently discharged. Ms. Jones has been absent from work on a number of occasions since her fall. Sick leave certificates have been submitted to the Port Authority.



- [4] By letter dated 14th January 2009, the Port Authority terminated Ms. Jones employment.
- [5] Ms. Jones instituted these proceedings in which she alleged that her services were wrongfully terminated for no reasons in breach of her terms of employment and contrary to the Protection of Employment Act 2003, and the Common Law. Ms. Jones further alleged that she was wrongfully dismissed and suffered physical and emotional damage. Ms. Jones claimed the following reliefs:
- (a) Special damages in the sum of \$8,057.00
 - (b) General damages for emotional and mental distress
 - (c) Interest at the rate of 6% from January 2009 until date of payment
 - (d) Costs.
- [6] The Port Authority in its defence denied that Ms. Jones illness was as a result of her falling at her place of employment. The Port Authority contends that Ms. Jones employment was terminated in accordance with Section 9(2) of the Protection of Employment Act and further no notice is required under the Common Law where an employee is dismissed for cause. The Port Authority also contends that damages for injury to feelings or reputation are not awarded in employment law cases.

EVIDENCE

- [7] Ms. Jones testified on her own behalf and Ms. Rhondeen George testified on behalf of the Port Authority.
- [8] Ms. Jones testified that she was employed with the Port Authority as a receptionist from May 7, 2007 at a monthly salary of EC\$1,117. On 27th February 2008 she fell while at work and struck her head and knees. She was treated at the Milton Cato Hospital and discharged. She continued to suffer constant headaches which necessitated further medical examination in Saint Vincent and the Grenadines, Trinidad, Jamaica and Barbados she was diagnosed as suffering from post traumatic epilepsy and was placed periodically on sick leave after a seizure. She would return to work at the end of the sick leave. All certificates of sick leave and medical reports were submitted to the Port Authority.
- [9] By letter dated 9th May 2008 the Port Authority advised her to forward all correspondence in relation to her fall to the Port Authority's Counsel Messrs Baptiste & Co. Her medical condition is due to the Port Authority's negligence in not providing her with a safe place of work.
- [10] On 14th January 2009 she received a letter of even date terminating her employment and the Port Authority wrongfully refused to employ her from and after January 15, 2009. She has suffered physical and emotional distress.

- [11] Permission was granted for amplification and Ms. Jones further testified that on January 14, 2009 she was at home having been placed on sick leave after she had suffered a seizure attack. Her mother collected the letter. Since the fall she has been admitted to the hospital periodically and she is still being treated.
- [12] Under cross-examination Ms. Jones agreed that she had instituted proceedings in relation to the injuries she suffered as a result of the fall.
- [13] Ms. George testified that she is the Administrative Secretary. During the period that Ms. Jones was employed at the Port Authority she was Ms. Jones supervisor. She is aware that Ms. Jones fell while at work and was taken to the Milton Cato Hospital. Ms. Jones subsequently submitted a sick leave certificate at least once in each month. Ms. Jones also submitted several medical reports. During this period Ms. Jones also absent herself from work for several days without submitting a medical certificate or without having authorized leave of absence from the Port Authority. As a result of her being Ms. Jones' supervisor she was aware of all medical certificates and reports submitted on behalf of Ms. Jones. The final medical certificate submitted was the period November 19, 2008 to 18th December 2008. After the expiration of the certificate Ms. Jones did not return to work nor did she communicate with the Port Authority. As a result of her failing to return to work the Board of Directors decided to terminate her employment on January 15, 2009 in accordance with Section 9(2) (a) of the Protection of Employment Act 2003.
- [14] Under cross-examination Ms. George testified that on occasion when Ms. Jones was absent she would call her home and her mother would indicate that she was not well. She did not call Ms. Jones when she did not report to work after the expiration of the sick leave in December. Ms. George also testified that she was not aware of any complaints made against Ms. Jones, nor was Ms. Jones invited to a meeting to discuss matters nor was there any instance of misbehavior, abuse or dishonesty by Ms. Jones. Ms. Jones was never rude to her.

SUBMISSIONS

- [15] Mr. Robertson submitted that the dismissal of Ms. Jones was a nullity as it was based on a non existent law since there is no Section 9(a) in the Protection of Employment Act 2003. Further no reasons for dismissal were given in breach of Section 34 of the Protection of Employment Act. Mr. Robertson relied on the case of **Crake v Supplementary Benefits Commission**¹.
- [16] Mr. Robertson next submitted that the dismissal was contrary to Part 13.3 of the Staff Rules and Regulations to the Port Authority since none of the circumstances existed for summary dismissal of Ms. Jones. The Port Authority failed to take into account the fact that Ms. Jones illness was as a result of her fall at work. Mr. Robertson referred to **Halsbury's Laws of England**².

1. [1982] 1 AER 498

2. Vol 16, Paragraphs 564, 570 and 574

- [17] Mr. Bollers in response submitted that a claim for wrongful dismissal is based on an assertion of contractual rights under the Common Law – see **Julius Corbette v National Bank of Dominica**³. The provisions of the Protection of Employment Act are inapplicable. The Act deals with unfair dismissal which is a concept created by a statute. A claim for wrongful dismissal is based on contract and is governed by the Common Law – **Ray George v BVI Ports Authority**⁴.
- [18] Mr. Bollers referred to **Chitty on Contracts**⁵ and submitted that under the Common Law an employer when dismissing an employee need not allege any specific act of misconduct on the part of the employee as the ground for dismissal; it is sufficient if such a ground did exist whether or not the employer knew of it at the time of the dismissal.
- [19] Mr. Bollers next submitted that under Article 7(3) of the Memorandum of Agreement a medical certificate was required to be submitted for any period exceeding two (2) consecutive days. The final medical certificate submitted by Ms. Jones was for the period 19th November 2008 to December 18 2008. Ms. Jones did not resume duty and there has been no communication from her as to the reason why she was absent from work. The Port Authority was therefore entitled to treat this breach of Ms. Jones as a repudiation of the contract of employment and to terminate her employment.

COURT ANALYSIS

- [20] I agree with the submission of Mr. Bollers that the Protection of Employment Act is inapplicable to this case. The Act deals with the concept of unfair dismissal whereas the issue in this case is whether Ms Jones was wrongfully dismissed which is governed by the common law. The difference between the concepts of wrongful dismissal and unfair dismissal was discussed by Sir Vincent Floisac in the case of **Burrell v Schneider** where the Labour Code of the Territory of the Virgin Islands which is similar to the St Vincent Protection of Employment Act was discussed. Sir Vincent stated:
- “At the time of the enactment of the Labour Code, an employee had a common law right not to be wrongfully dismissed. The Labour Code did not abolish that right. The Labour Code merely supplemented that right by a statutory right not to be dismissed... The Common Law right is based on contract and the statutory right is based on social policy.”
- [21] The Protection of Employment Act sets out in Part V the procedure to be followed where a claim is made for unfair dismissal. An employee who alleges unfair dismissal must follow that procedure.
- [22] In **Halsbury's Laws** the issue of absence from work by an employee is dealt with in the following manner:
- “**What amounts to a breach of contract.** There is a breach of contract of employment whenever the employee absents himself from work without just cause or excuse or leave his employment without just cause or excuse before the expiration of the agreed term, or where no term has been fixed for the duration of the contract, without giving due notice.”

[23] The concept of wrongful dismissal was explained in the case of Wallace v United Grain Growers Ltd (1997) 152DLR 1 (39) as follows:

"The action for wrongful dismissal is based on an implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship (or pay in lieu thereof) in the absence of just cause for dismissal.... A wrongful dismissal action is not concerned with the wrong or rights of the dismissal itself. Far from making dismissal a wrong the law entitles both employer and employee to terminate the employment relationship without cause. A wrong arises only if the employer breaches the contract by failing to give the dismissed employee reasonable notice of termination. The reward for this breach of contract is an award of damages based on the period of notice which should have been given."

[24] The common law concept of wrongful dismissal is also discussed in Malloch v Aberdeen Corporation (1971) 1WLR 1578, at 158 where Lord Reid stated:

"At common law a master is not bound to hear his servant before he dismisses him. He can act unreasonably or capriciously if he so chooses but the dismissal is valid. The servant has no reward unless the dismissal is in breach of contract and then the servant's only remedy is damages for breach of contract."

[25] The House of Lords in the case of Johnson v Unisys Ltd⁷ approved of the above statement and stated:

"The action for wrongful dismissal could therefore yield no more than the salary that should have been paid during the contractual period of notice."

[26] Lord Hoffman went on to consider the ratio in Addis v Gramophone Co. Ltd [1909] A.C. 488 and Mahmud v Bank of Credit and Commerce International SA [1998] AC 20, and stated that at paragraph 44 as follows:

"My Lords, such an approach would in this country have to circumvent or overcome the obstacle of Addis v Gramophone Co. Ltd.... in which it was decided that an employee cannot recover damages for injured feelings, mental distress or damage to his reputation arising out of the manner of his dismissal. Speaking for myself, I think that, if this task was one which I felt called upon to perform, I would be able to do so. In Mahmud v Bank of Credit Ltd Commerce International SA... Lord Steyn said that the true ratio of Addis's case was that damages were recoverable only for loss caused by a breach of contract, not for loss caused by the manner of its breach. As Mc Lochin J said in the passage I quoted, the only loss caused by a wrongful dismissal flows from a failure to give proper notice or make payment in lieu. Therefore if wrongful dismissal is the only cause of action, nothing can be recovered for mental distress or damage to reputation. On the other hand, if such damage is loss flowing from the breach of another term implied from the contract, Addis's case does not stand in the way. That is why in Mahmud's case itself, damages were recoverable for financial loss flowing from damage to reputation caused by a breach of the implied terms of trust and confidence."

7. [2001] VKHL 13

[27] It is agreed by both sides that the Memorandum of Agreement forms part of the terms and conditions of Ms Jones' contract of employment. Article 7 of the Memorandum of Agreement deals with sick leave. It reads as follows:

"ARTICLE 7: SICK LEAVE

1. Monthly and full time workers employed by the Port shall be entitled to a maximum of sixty (60) calendar days sick leave annually, on the production of a Medical Certificate from a qualified Medical Practitioner. The NIS shall contribute 65% of the worker's salary and the Employer 35% during this period. However, the Port Authority shall pay 100% of the Worker's salary/wage on the condition that the total amount from the NIS is paid to the Port. Employees are expected to complete the Medical Form with the NIS to facilitate refunds to the Port. In the event that employees fail to prepare and submit the necessary application form, deductions will be made from their salaries at the next pay dates consistent with the amount that should have been received from the NIS."
2.
3. A medical certificate must support sick leave for any period exceeding two (2) consecutive days. Workers will only be allowed a maximum of six (6) uncertified sick leave per year.

[28] Ms Jones does not deny that she was absent from work during the period December 19, 2008 to January 14, 2009. She also does not dispute that she did not provide a medical certificate to the Port Authority or to the Port Authority's Counsel Baptiste and Co. in relation to this period of absence. During amplification of her evidence Ms. Jones simply stated "On 14th January 2009 I was at home. I was placed on sick leave after having a seizure." Ms Jones conduct was in violation of Article 7.3.

[29] Mr. Robertson contended that in view of Part 13.3 of the Staff Rules and Regulations the Port Authority could not effect summary dismissal of Ms Jones. Part 13.3 reads as follows:

"13.3. An employee will not be dismissed summarily, except in the following circumstances:

- (a) theft
- (b) willful damage to the Authority's property
- (c) gross insubordination; striking or assaulting another employee; use of abusive and obscene language to a superior officer
- (d) willful disobedience in failing to perform a reasonable order;
- (e) fragment violation of rules and procedures, especially concerning safety."

[30] Mr. Bollers disputes that the Staff Rules and Regulations form part of Ms Jones terms and conditions of employment since her letter of employment states:

"All other terms and conditions of your employment remain in accordance with the Memorandum of Agreement with the SVG Port Authority and the National Workers Movement. In addition you are to be guided by the Port Authority's Staff Rules and Regulations."

[31] Assuming the Staff Rules and Regulations also form part of the terms and conditions of Ms Jones employment Article 17.2 states as follows:

"Sick leave on full pay due to illness or injury may be granted by Port Manager up to the limit set out in the schedules at the end of this Chapter without affecting eligibility for annual or accumulated leave. Such leave may be granted in short periods or all at one time provided that absence for more than two consecutive working days on any one occasion must be supported with by a medical certificate. Officers and employees requiring leave on grounds of illness or injury must submit applications for sick leave no later than the second day of absence from duty."

[32] Based on the evidence of the Port Authority which was not contradicted by Ms Jones. Ms Jones not only acted in breach of Article 7.3 of the Memorandum of Agreement but also in breach of Article 17.2 of the Staff Rules and Regulations. This is a situation where Ms Jones was absent from work for a continuous period of twenty six (26) calendar days without presentation of a certificate of sick leave or any approved leave. Indeed there was no communication written or oral from Ms Jones to the Port Authority acknowledging her absence from work and giving any explanation for her absence. In those circumstances Ms Jones' conduct amounted to a flagrant violation of the rules being rule 17.2 and the Port Authority was entitled to effect summary dismissal of Ms Jones in accordance with Article 13.3 of the Staff Rules and Regulations.

[33] I also agree with the submission of Mr. Bollers that in view of Ms Jones' conduct as described above, the Port Authority was entitled to treat the contract of employment at an end and summarily dismiss Ms Jones.

[34] In conclusion I find that the onus was on Ms Jones to show that her dismissal was wrongful, this she failed to do. I find that based on the evidence Ms Jones was not wrongfully dismissed.

[35] **IT IS ORDERED:**

1. The claim is hereby dismissed
2. The claimant shall pay the defendant costs as agreed in the sum of \$5000.00.


Gertel Thom
High Court Judge