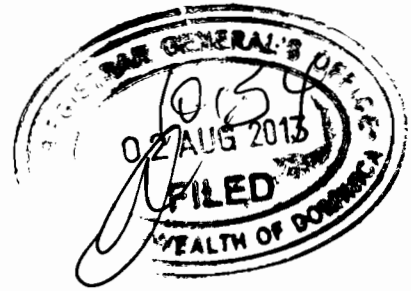


COMMONWEALTH OF DOMINICA

DOMHCV2011/0065



BETWEEN:

BENTON WYKE

Claimant

and

PDV CARIBE DOMINICA LTD

Defendant

Before: The Hon. Justice Brian Cottle

Appearances:

Mr. J.G Gildon Richards for Claimant

Mr. Rene Boucher for the Defendant

[2013: February 28th]
[March 11th 27th]
[August 2nd]

JUDGMENT

- [1] **COTTLE J:** The claimant filed a claim for damages for breach of contract and unfair dismissal or wrongful dismissal. The claimant had been employed by the defendant as operations supervisor. In his statement of claim, the claimant says the employment contract was partly written and partly oral. The claimant also averred that the parties by their conduct during the term of the said agreement agreed to employ the claimant who agreed to serve the defendant for a period of ten years in the first instance, unless the said agreement was earlier terminated by the defendant for reasonable cause or terminated by the claimant upon reasonable notice given to the defendant"
- [2] In their defence, the defendant company avers that there was no agreed fixed term to the employment contract. The claimant's employment commenced around 31st July 2008. On 16th August 2010 the claimant was summarily dismissed. The expressed cause was the failure of the claimant to account for some 271 gallons of diesel.
- [3] On 20th April 2010 the claimant was supervisor at the defendant's fuel depot. 7,300 gallons of fuel were loaded on to a truck driven by J. Joseph an employee of the defendant, for delivery to a customer of the defendant. At the customer's reception facility only 7,029 gallons were delivered. The truck was returned to the defendant compound. It was next used on 22nd May 2010 when a further 7,300 gallons of fuel was loaded for delivery. The carrying capacity of the truck is 7,300

gallons. The defendants say the claimant did not inform them of the non delivery of 271 gallons on the 20th April 2010. The fact that they were able to load 7,300 gallons on 22nd April 2010 must mean that 271 gallons were missing and unaccounted for.

- [4] The claimant's position is that 271 gallons remained on board the vehicle. No one physically inspected the tanker to ascertain its contents before it was loaded on 22nd April 2010. He also says that he verbally informed Tamica Daniel that only 7,029 gallons had been delivered on 20th April 2010 upon the return of the fuel truck on that date. Ms. Daniel gave evidence. She denied that any report had been made to her. She says she only discovered the discrepancy on 23rd April 2010 when she examined the delivery notes for 20th April and 22nd April 2010.

The Legal principles

- [5] The pleadings couch the claim in terms of unfair or wrongful dismissal. It is not immediately clear which of these entirely different concepts the claimant is invoking. Wrongful dismissal is dismissal in breach of contract. In cases of wrongful dismissal, the court is called upon to consider the terms of the employment contract. If the employer has breached some term of the contract this may give rise to a claim for damages. In the present case the claimant says the employment contract was partly oral, partly written and partly to be inferred from the conduct of the parties. No contractual period of notice is pleaded or evidenced by the claimant. The only conduct by the defendant complained of is the termination by the defendant of the claimant's employment.
- [6] In the dismissal letter the defendant gave a reason for the summary dismissal of the claimant. At common law an employer could dismiss an employee if the employee so misconducts himself that his behavior is inconsistent with the due and faithful discharge by the employee of the duties for which he was engaged. In the present case the defendant was responsible to ensure the proper loading of fuel into the truck for delivery and accounting for its due delivery to correct customers. To my mind if the factual contention of the defendant is correct in that the claimant failed to properly account for the defendant's goods this is good cause for immediate dismissal.
- [7] The evidence of the witness is ad idem that 7,300 gallons were loaded onto the fuel tanker on 20th April 2010 for delivery. 7,029 gallons were delivered. There is a dispute as to what became of the 271 gallons that should have remained in the tanker, it is, however not disputed, that the claimant did not report the undelivered fuel to the accounts department in writing. He says he did so orally to Tamica Daniel. She denies such a report. I think it more likely than not that the claimant failed to report the short delivery. I arrive at this conclusion when I consider that Ms. Daniel raised the issue of the discrepancy when she examined the delivery notes for 20th April 2010 and 22nd April 2010. Had the claimant been concerned with the issue of the undelivered fuel he could hardly have refrained from questioning how 7,300 additional gallons could be loaded onto a truck already containing 271 gallons when the capacity of the vehicle was only 7,300 gallons.
- [8] The claimant wrote a letter attempting to explain that he had reported the delivery discrepancy to Ms. Tamica Daniel on 21st May 2010. At the time of his dismissal, the company had only been told that the claimant reported orally to Ms. Daniel on 21st May 2010. Thus at August 9, 2010 the company was correct in its view that there had been no prompt report made by the claimant. In his witness statement the claimant does say that his letter to the company was in error and he meant 21st April 2010 as the date he reported to Ms. Daniel. But as indicated earlier I find as a fact that

the claimant made no report to Ms. Daniel. This failure in his duties is to my mind sufficient cause for his dismissal.

[9] The claim for unfair dismissal has a statutory basis. Chap 89:02 of the Laws of Dominica, the Protection of Employment Act, at section 5, allows for the summary termination of an employee for serious misconduct. I have found that the claimant failed to report the undelivered fuel to his employers at all. This meant that the employers had no opportunity to ascertain that the undelivered fuel was returned in the vehicle. This misconduct falls within the limits of what the statute prescribes as grounds for termination. I therefore find that the claimant was not unfairly dismissed.

[10] The claimant having failed to prove his claim the court finds for the defendant. The claim is dismissed. The claimant will pay to the defendant prescribed costs in the sum of \$7,500.00.



Brian Cottle
High Court Judge