

EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

(CIVIL SUIT)

BRITISH VIRGIN ISLANDS
BVIHCV 2011/0090

CLEAVE FARRINGTON

Claimant

V

CITCO B.V.I. LIMITED

Defendant

Appearances:

Marie Lou Creque, Candice Raphael -DeJonge of SCA Creque for the Claimant
Dionne Boreland-Fearon, Michael Maduro of Harney Westwood & Riegels for the Defendant.

**(EMPLOYMENT LAW- WHETHER UNDER THE LABOUR CODE ORDINANCE CAP.293 AN
EMPLOYEE CLAIMING TO HAVE BEEN UNFAIRLY DISMISSED CAN BRING A CLAIM IN THE
COURTS FOR DAMAGES FOR UNFAIR DISMISSAL – SUCH CLAIM NOT SUSTAINABLE AS PURELY
STATUTORY CONCEPT AND ONLY ENTITLED TO REMEDIES PRESCRIBED BY THE STATUTE).**

2012: May 15, 22

2012: July 5

Judgment

[1] **Joseph-Olivetti J:** Persons who provide financial services in the Territory of the Virgin Islands guard their portfolio jealously and brook little patience with real or imagined security threats whether internal or external as Mr. Cleave Farrington found out to his dismay on 17 November 2009. Mr. Farrington was an internal corporate administrator with Citco BVI Limited “(Citco)”. He emailed work from his office to his personal hotmail account to be completed at home during his holidays. His employer learnt of that and as a result they accused him of breaching company policy in sending the e-mail and gave him an ultimatum – resign with a payment of \$11,000.00 or face summary dismissal. He opted for resignation. He now claims, *inter alia*, damages for having been unfairly dismissed whilst Citco insists that he resigned voluntarily or alternatively that they had good reason to dismiss him summarily for serious misconduct. Citco, not to be outdone, counter-claimed for the return of the money.

[2] **Agreed Facts**

[3] These are summarised in Mr Farrington’s pre trial memorandum of 23 Feb. 2012 and Citco’s pre- trial submissions filed 8 May 2012. They are to the effect that Mr. Farrington admits sending an e-mail containing company data to his personal external e-mail address; that he saw and signed

memoranda relating to Citco's End User Security Policy, that Citco admits that Mr. Farrington was invited to a meeting with the manager and two other members of Citco's management team and lastly Citco admits that it inadvertently omitted to include the sum of \$3,549.11 (pension benefits under its 13.96 scheme) in the sum paid to Mr Farrington at the time of his resignation.

[4] **The Main Facts As Found**

[5] We heard from Mr. Farrington and on his behalf, Ms. Pamela Rymer -Trumpet and Mr. Preston Stoutt. The witnesses for Citco were Ms. Marloes van Egeraat-Bon, Ms. Siobhan Gillespie and Mr. Ricardo Marrero.

[6] Citco is a trust company whose range of services includes the incorporation, maintenance and administration of a portfolio of British Virgin Islands companies. It is a member of the Citco Group of companies, a network of global financial services companies with offices in over 40 countries. Citco's managing director, Ms. Gillespie testified, and that was not disputed, that Citco's clientele includes multinational companies, global 500 companies and private individuals and that it is essential that their client information is stored in a secure environment at all times.

[7] As we have already heard, Mr. Farrington was an internal corporate administrator with Citco having been employed with them for about 21 years. He began as an accounts clerk in September 1988 by contract evidenced in his letter of employment dated 30 August 1988 which contract was amended on July 7 2006. At all material times Mr. Farrington was responsible for maintaining several accounts, e.g. accrued expenses, prepaid expenses, cash and stamps reconciliation, upload of disbursements (including disbursements of VIRRGIN transactions to Citco's clients), monthly reconciliation between Citco's online VIRRGIN account and their financial records, reconciliation of cross accounts and inter-company settlements.

[8] In his contract of employment as amended Mr. Farrington agreed that Citco's policies, in particular the Code of Ethics and the End User Security Policy were expressly incorporated into his contract ; he acknowledged receipt and understanding of them; agreed to abide by them and acknowledged that they formed an integral part of his contract. Further, he acknowledged that Citco had the right to amend, revoke or replace any of those policies as needed and that such amended policies were deemed to be incorporated into his contract.

[9] The End User Security Policy (Tab.3 p.84), **inter alia** advises that security policies are in place to provide maximum security and efficiency of resources. That they are required to prevent unauthorised access and damage to Citco's premises, equipment and information which are vitally important Citco assets and that adherence to these policies is mandatory. Further, that the management team is the custodian of the data and may dictate the usage of, and control of all access to such data. It is also made abundantly clear that violations of the policies are subject to audit, disciplinary and legal ramifications and further that the use of POP 3 and HTTP-based email (yahoo, excite, hotmail etc) is discouraged since these can be entry points for viruses and are not automatically scanned as they enter the network. And additionally that under no circumstances shall Citco confidential or company restricted data be transmitted or published over the internet without proper authorizations from the management team and that all confidential and company restricted data must be encrypted using approved methods before being transmitted over the internet.

- [10] Mr. Farrington's contract of employment expressly stated: **-"The employee hereby agrees and acknowledges that any breach of the provision or regulations above stated may constitute grounds for either disciplinary action or dismissal by the Employer."**
- [11] Any lingering doubt that Citco takes security issues seriously can be swiftly put to rest by the fact that all employees including Mr. Farrington were given security awareness training and each year they had to sign and acknowledge receipt and understanding of the End User Security Policy and to re-affirm their commitment to abiding by Citco's Security Policies. Mr. Farrington signed these acknowledgments yearly as required, the last on 22 Oct.2009. (Tab3 p 92)
- [12] On 6 Nov.2008 Citco's head office issued a memorandum to all staff worldwide advising that several members of staff had been transferring files and email, property of Citco or their clients outside the Citco network to third party e-mail addresses(including some staff members own private e-mail addresses and staff were reminded of the provisions of the End User Security Policy .***They were specifically advised that Citco disapproved of the practice of transferring files and e-mail that were the property of the company to external storage devices and to third party e-mail addresses, including staff members' own private e-mail addresses.*** In addition they were warned that any breach of the policy whereby Citco's proprietary data or client data was published or transmitted without authority outside the environment of the Citco network will be regarded as theft and that management **reserved the right to take whatever steps necessary to protect the integrity of Citco's property and that of its clients including immediate termination for cause and filing of criminal charges.**
- [13] On 5 November 2009 Citco's head office issued another memorandum to all staff worldwide alerting them to the threat posed to Citco by deceptive persons seeking confidential information by phone calls and e-mail. Vigilance was demanded and they were told not to release any information to a non Citco fax or email and that if any employee knowingly or purposefully breached that policy he/she would jeopardise his /her employment.
- [14] Mr. Farrington did not dispute having had sight of these memoranda and I am satisfied on his own evidence at para. 18 of his witness statement that he received both of them.
- [15] On November 8 2009 Mr.Farrington emailed large volumes of Citco's financial data to his personal email account (a hotmail account) .He said he did so to enable him to complete an outstanding assignment at home during his holidays. This explanation was challenged as unreasonable in light of the fact that this assignment (reconciliation of the VIRGIN accounts) had been repeatedly requested of him for about 4 months prior to his scheduled holiday. The several email correspondence between him and Ms Bon (the then financial controller) at Tab 14 is eloquent on this. I therefore find that his explanation was dubious at most.
- [16] Be that as it may, these email transactions were logged by Citco's head office in Miami who monitored all electronic transactions. They alerted Citco on November 9 and Ms. Gillespie, telephoned Mr. Farrington on 16 November (he was still on leave) and invited him to a meeting when he returned to work the next day. Mr. Farrington would have us believe that he was taken by surprise when he showed up for work but his letter to the Labour Commissioner of 23 Nov. bears out that he had prior notification of the meeting. See Tab 22 p.249 para 3.This explains the seeming mystery of

why he was able to arm himself with a recording device and surreptitiously tape the proceedings at the meeting.

[17] It is apparent from the transcript of the meeting at Tab 9 that Ms. Gillespie had been directed by Head Office to dismiss him for breach of the End User Security Policy as they had a zero tolerance policy and that she had consulted with Citco's lawyers and Ms. Bon, Mr. Farrington's immediate supervisor before meeting with him.

[18] Ms. Gillespie is recorded as saying to Mr. Farrington at that meeting on 17 November 2009 that because of his long years of service she had persuaded Head Office to allow her to offer him the option of resigning instead of being summarily dismissed. Ms. Gillespie in the presence of Ms. Bon and Citco's **Human Resources Manager, Ms. Joanna Boyd** told him words to the effect that he could resign and that if he did so she would give him a payment of \$11,000.00 or if not he would be terminated for cause at once. He was required to make a decision then and there and so was given no opportunity to seek legal advice. Ms. Gillespie did not dispute this.

[19] Not surprisingly, faced with this stark choice Mr. Farrington resigned. Citco made arrangements to pay him the agreed sum of \$11,000.00 plus salary accrued to date and they gave him a fine reference at his request. However, he still felt aggrieved and subsequently sought redress from the Labour Commissioner, Minister of Natural Resources and Labour, the Deputy Governor's Office (it is not clear why as the Deputy Governor has no jurisdiction under the Labour Code Ordinance Cap. 292) but meeting with no resolution he filed this suit on April 5, 2011.

[20] **The Main Issues arising**

[21] The main issues for determination can be stated as follows and were agreed save for the first and second points:-

- (1) Is Mr. Farrington entitled to bring a claim for damages for unfair dismissal?
- (2) Whether Mr. Farrington accessed and transmitted confidential information outside of the Citco network to his personal email account in contravention of the Citco End User Security Policy;
- (3) Was Mr. Farrington dismissed from his employment or did he resign?
- (4) If it is found that Mr. Farrington resigned, whether the payment of \$11,000 was offered and accepted as full and final settlement;
- (5) If Mr. Farrington is found to have been dismissed, was this dismissal unfair in the circumstances?
- (6) If Mr. Farrington is found to have been unfairly dismissed, what is the measure of damages to which he is entitled?

[22] **Issue 1 – Is Mr. Farrington entitled to bring a claim for damages for unfair dismissal?**

[23] This is a preliminary issue taken by Citco at trial and in my judgment ought properly to have been taken at the case management stage as if it were successful it would have saved the expenses of a full trial. Learned counsel for Citco, Mrs. Boreland-Fearon submitted in gist that as a matter of law Mr. Farrington cannot claim damages for unfair dismissal as it is a statutory concept arising by virtue of the Labour Code Ordinance (Cap 293) and that Cap 293 itself provides specific remedies which do not include damages. That under the provisions of Cap 293 the only remedy available to an employee who had been unfairly dismissed was conciliation and so unfair dismissal does not give

rise to a separate cause of action for damages or any other remedy. Ergo, Mr. Farrington's claim for unfair dismissal should be struck out.

- [24] Counsel relied on **Ray A. George v British Virgin Islands Ports Authority (BVI Civil Appeal No. 28 of 2006)** (Barrow J.A) in which the court adopted and followed **Burrill v. Schrader** (1995) 50 WIR 193. (Sir Vincent Flossiac CJ) to the effect that unfair dismissal does not exist as a concept of common law but was created and introduced into the field of employment law by statute and that the only remedy was conciliation and not damages..
- [25] Counsel also relied on, Hariprashad-Charles, J.A. (Ag) in **Bryon Smith v British Virgin Islands Electricity Corporation** (BVI Civil Appeal No. 10 of 2008) which followed **Ray Charles** and reaffirmed that Cap 293 makes no provisions for damages to be awarded to an employee who has been found to have been unfairly dismissed. The court emphasised at para. 23, that the High Court cannot disregard the legislative intention whether or not the new procedures appear to be inadequate or unsatisfactory.
- [26] Mrs. Creque and Mrs. De Jonge, learned counsel for Mr. Farrington chose not to respond to this issue as appears from my careful perusal of their written submissions of 11 and 24 May (no oral submissions were made). I remark that they had ample warning and opportunity as the point was first taken in Citco's pre trial submissions of 8 May 2012 and made again in their closing submissions of 21 May. This approach of not dealing with points raised by one's opponent is far from helpful. If counsel is compelled in the face of binding authority to concede then one ought properly to do so if not one should contest the point and not simply morph into ostrich mode.
- [27] I have considered the authorities cited and the relevant provisions of Cap 293. Section C59 speaks to remedies. An aggrieved employee can seek a resolution of the issue of whether he has been unfairly dismissed or not by filing a complainant with the Labour Commissioner and in subsequent provisions the procedure is laid out for the Labour Commissioner and, if necessary, the Minister to seek to achieve a voluntary adjustment or settlement of the issues raised. Nothing is said about a right to damages and it must follow that conciliation is the only available remedy¹ under the statute which creates the concept of unfair dismissal.
- [28] **Burrill** was concerned with claims for damages for wrongful dismissal and unfair dismissal brought by the former managers of Marina Cay restaurant against the new managers and the specific Labour code in force then was the 1975 legislation. However, I am satisfied that the relevant provisions are on all fours with those in Cap 293 and that the learning in **Burrill** is applicable indeed as the Court of Appeal found in **Ray Charles** and **Byron Smith** .
- [29] I am thus satisfied that the law is settled. Under Cap 293 there is no remedy in damages for a claim for unfair dismissal; the only remedy lies in conciliation to be conducted by the Labour Commissioner and failing this further redress from the Minister of Labour. To put this issue at rest now that the law is certain I now have to be satisfied that the claim or part thereof is indeed one for damages for unfair dismissal.

¹ Noteworthy that Sir Vincent observed in **Burrill** at 198e : - "What is the remedy of an employee for unfair dismissal? ...The Labour Code merely provides for conciliation, which I would hesitate to classify as a remedy..." A new labour code has recently been promulgated and it is hoped that the new legislation adequately addresses the continually vexed issues of remedies and enforcement.

- [30] I have considered the Claim Form and Statement of Claim ("SC") to determine the nature of the claims made. In para. 3 of the SC Mr. Farrington alleges that he was **"unlawfully terminated"**. In Para. 19 he alleges that by letter dated 25 Nov 2009 to the Labour Commissioner he filed a claim for **"unfair dismissal"** in accordance with section 59(1) of Cap.293 but that no decision was made by the Department of Labour. That letter (Tab 24 para. 5) states expressly that he does not want his job back because of the vindictiveness he encountered; that he does not intend to seek legal action against Citco for resignation under duress as he chose to resign with a severance package and that his primary goal in writing was to require assistance to:- (1)obtain the immediate recovery of his personal effects, (2) payment of \$4120.39 as short paid salary ,and (3)severance pay for 21 years and 2 months less the sum paid to him.
- [31] In para.20 of his SC Mr.Farrington refers to his pre- action letter to Citco claiming **"unlawful dismissal"**. That letter (Tab 22 p.254) refers to a claim for damages for-**" (1) unlawful termination through duress;(2) aggravated damages for manner of dismissal (3) loss of health insurance and (4) loss of income -unpaid salary."** And in para. 3 p. 255 he alleges that Citco had no grounds to terminate him pursuant to the labour code test for **"unfair dismissal"**. And finally, in his prayer in this suit he claims:- **" (1), unfair dismissal- 6 months' salary -\$31,626.00; (2), reduction in income-6 months \$16,626.00; (3), loss of income-2 months \$10,542.00; (4), short paid salary ,based on 13.9 scheme -\$3,549.11; (5), aggravated damages re manner of dismissal; (6) prescribed legal costs and (7),further or other relief as the court deems fit"**.
- [32] In my judgment, having regard to the SC taken as a whole, the pith and substance of his case is one for damages for unfair dismissal. Therefore, in keeping with established law Mr. Farrington's claim for damages for unfair dismissal cannot be sustained and it follows that that part of his claim/claims addressing unfair dismissal must perforce be struck out.
- [33] Having found that Mr Farrington's claim for damages for unfair dismissal cannot be entertained no useful purpose can be served in considering the remaining issues which all flow or arise directly from a claim for unfair dismissal as it is well established that this court is not called upon to make purely academic findings. See also CPR 26 (2) (J) which gives the court a discretion to exclude an issue for determination if the court can do substantive justice between the parties on the other issues and determine it would serve no worthwhile purpose. This also applies to Citco's cross-claim which was premised as an alternative if they failed to refute Mr. Farrington's claim for unfair dismissal.
- [34] **Agreed liability**
- [35] There is however one separate issue which arose on the pleadings and is not dependent on a claim for unfair dismissal being in reality one for breach of contract. This relates to Mr Farrington's claim for being short paid salary. This claim was properly conceded having regard to the evidence of both Mr. Farrington and Ms. Bon. Citco is therefore ordered to pay that sum **of \$3549.11** to Mr. Farrington together with interest at the commercial rate of \$ 8% per annum from 17 November 2009, the date the sum was due, until judgment as they have had the benefit of that money since that date and had no reason for withholding it.

[36] **Costs**

[37] In all the circumstances exercising the court's discretion on costs I deem it just that Citco pay Mr. Farrington the costs of this trial to be assessed upon application with 14 days if not agreed. Each party has to some extent succeeded in some part of their arguments albeit Citco was more successful. However as I have already said Citco ought properly to have taken this substantive legal point at a much earlier stage and so saved everyone the additional costs of going to a full trial. Counsel has a duty to assist the court in furthering the overriding objective and waiting until the last minute to raise a legal point which arises on the pleadings can hardly said to be in keeping with that obligation.

[38] **Conclusion**

[39] In conclusion, for the foregoing reasons the claim which the court has found is substantially one for damages for unfair dismissal must be dismissed. However, Citco in accordance with their concession is ordered to pay to Mr. Farrington the sum of **\$3549.11** with interest of 8% per annum from 17 November 2009 to judgment and costs to be assessed upon application made within 14 days if not agreed.

[39] **Postscript**

[40] By way of footnote I am compelled to make the following observations. I firmly believe that had Citco acted in a more reasonable manner in their initial approach to Mr. Farrington this barren controversy may never have arisen. No breach of contract entitles an employer to treat his /her "**weak and erring**"² employee as a leper or a villain. Citco was not justified in effectively denying Mr. Farrington access to legal counsel in making a decision which would have such far-reaching consequence on his future career or to hold on to Mr. Farrington's personal effects until after 29 November 2009. And this after they at the meeting had agreed to let Ms Boyd clear his desk for him. They gave no explanation for this unseemly delay. Surely, business is not conducted in a vacuum; what does it profit a person (and I do believe that persons lurk behind the benign facade of companies and their head offices) to fill her/his coffers and in so doing lose touch with simple humanity? Mr. Farrington as a loyal employee of 21 years standing merited a kinder approach from his employer and ought to have been given the opportunity to obtain advice before being required to make a decision. I also remark that employers are sometimes all too eager to allow a transgressor to resign and to pass the real or imagined problem on accompanied by glowing terms of reference. Perhaps they should reflect that if an innocent third party relies on this representation to his /her detriment that adverse consequences may result to them and that they cannot abrogate and reprobate as Citco sought to do here.

Rita Joseph-Olivetti
Resident Judge
Territory of the Virgin Islands

² Dickens of Agnes, Oliver's wretched mother