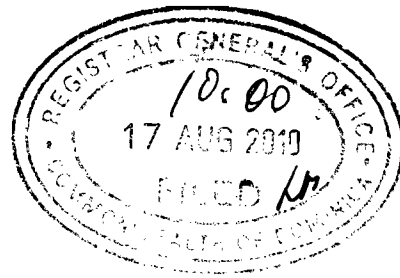


**EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)**



**COMMONWEALTH OF DOMINICA
DOMHCV2005/0219
BETWEEN:**

TRAVIS DESIR	Claimant
and	
PARAMOUNT PRINTERS	Defendant
MORRIS CHARLES	

Before: The Hon. Justice Brian Cottle

Appearances:

Mrs. Dawn Yearwood - Stewart for Claimant
Ms. Lisa Defreitas for first defendant
Mr. Michael Bruney for Second Defendant

JUDGMENT

[2010: 17th, 18th May]
[2010 August 17]

- [1] COTTLE J:** The claimant brought the present action against the first defendant for damages for wrongful dismissal and breach of statutory duty. Against the second defendant he claimed damages for wrongful eviction and trespass to goods. At the trial the claim against the first defendant for breach of statutory duty was abandoned.

The facts

- [2] The claimant is a citizen of St. Lucia. In 1999 he was recruited by the first defendant to work in its establishment in Dominica as a press operator. He continued in that employment until he was summarily dismissed on 17th August 2004. During the period of his employment the claimant resided in an apartment at Elmshall, owned by the second defendant. Less than two weeks after his dismissal he was evicted from the apartment in circumstances which are hotly contested.

The Case against Defendant 1

- [3] During the course of his employment with the first defendant, the claimant, in common with other employees of the first defendant, was a member of a trade union which had negotiated terms and conditions of employment with the first defendant. Under the provisions of the joint agreement the company agreed to "continue to make reasonable provisions for the safety and health of its employees during the hours of their employment". The company also agreed to furnish the workers with protective apparel, where applicable, such apparel to be agreed between workers and management.
- [4] The claimant had been making continued request for protective gear and apparel. On 17th August 2004 the claimant resumed duty after vacation leave in St. Lucia. He was assigned duties. He refused to carry out those duties. He says that his long standing concerns about safety apparel and gear had not been addressed. He requested to see Mr. Frank Baron the Managing Director of the first defendant.
- [5] Mr. Davidson Baron, the General Manager, was the person who had given the claimant his work assignment. He is the son of Mr. Frank Baron. He says he thrice requested the claimant to carry out his work assignment. When the claimant failed to comply, he dismissed the claimant. The issue is whether the claimant was justified in refusing work until his safety concerns were addressed or whether his refusal to work justified his summary dismissal.
- [6] Under the collective agreement the company was entitled to terminate the services of any employee without notice or payment of any severance pay or other terminal benefits where the employee has been guilty of serious misconduct affecting his employment. Serious misconduct is defined as such

misconduct that the company cannot reasonably be expected to take any course other than to terminate the employment of the employee.

Evidence

- [7] The claimant says that he was given gloves for the purposes of his employment. He describes these as food handler gloves. He received no apron, overall, or respirator. Mr. Davidson Baron for the first defendant says that the claimant was provided with proper gloves, aprons and respirators. His sister, who was General Manager before him, testified that employees, including the claimant, were provided with gloves - she describes these as nitrile gloves - aprons, and respirators.
- [8] A report from a team of inspectors from the government of Dominica which carried out an inspection of the first defendant's facilities on September 24th 2004, shortly after the claimant was dismissed, assists in resolving this conflict. At the time of the visit, the inspection team, consisting of the Acting Labour Commissioner, the senior Environmental Health Officer and an inspector from the Pesticides Control Board, found that "no protection gear of any kind was being worn or used by the employees neither was there any evidence of the availability of such protective gear at the facility."
- [9] I find it is more likely that the version of the claimant is correct and that the first defendant failed to provide any protective or safety equipment. I reject the evidence of Davidson Baron and his sister Annie Benjamin on this issue and accept that of the claimant. The question still remains however. Does this failure by the company justify the claimant's refusal to work? In his evidence the claimant says he refused to work because of the absence of the protective and safety gear and unspecified personal problems. As nothing further was said of these personal problems I do not take this into account in arriving at my conclusion.

The Law

- [10] The principles which guide the court in its consideration of a claim of wrongful dismissal such as the present case, have been helpfully restated by Haniprashad-Charles J in the recent case of Elphina Abraham v Sunny Canbbec Herbal and Spice Co. Ltd BVIHCV2007/0122 decided on April 20th 2010. The Learned judge reviewed the authorities. At paragraph [18] she puts the position shortly

"However, an employer has a common law right to dismiss his employee summarily on the grounds of the employee's serious misconduct, disobedience to lawful orders and negligence."

- [11] Each case will turn on its own facts. Mr. Desir had been working without the requisite safety gear for some five years- all of his working existence with the defendant. He was a member of a trade union and had mechanisms open to him under his collective bargaining agreement to address his concern with the defendant.
- [12] I do not in anyway minimize the first defendant's failure to provide safety equipment. However their failure cannot provide the claimant with justification for refusing to work. He could have had no reasonable fears for his own safety as he had been performing those duties from five years in safety. Had he, and other employees, after notifying the first defendant and having not had their concerns satisfactorily dealt with, decided to go on strike, they may well have been justified.
- [13] In the circumstances of this case I found that the claimant was unreasonable to refuse to carry out the orders of his employers and thus they were justified in his summary dismissal. I therefore dismiss the claim against the first defendant and award costs to the first defendant as agreed in the sum of \$5,000.00.

The case against second defendant

- [14] The claim against the second defendant is more nebulous. In the claim form the claimant seeks "\$5,000.00 representing cost and special damages due to the tortuous actions of the second defendant." In his statement of claim at paragraph 14, the claimant avers that
- "on or about 27th August 2004 the second defendant unlawfully entered the apartment of the claimant and tossed his belongings into the street."
- In the following paragraph he claims that he was "unlawfully evicted" and as a consequence of these occurrences he suffered loss and damage as his goods were destroyed stolen and/ or damaged. He goes on to list particulars of damage which I reproduce.

PARTICULARS OF DAMAGE

1. Three gold chains	- \$ 1, 400.00
2. Two gold rings	- \$ 750.00
3. Two car door glasses	-\$ 300.00
4. One pair leather sandals	-\$ 75.00
5. One bed spread	-\$ 125.00
6. One pressure cooker	-\$ 115.00
7. Five bed sheets	-\$ 300.00
8. Three t-shirts @ \$75.00	-\$ 225.00
9. One pair sneakers	-\$ 230.00
10. One fan	-\$ 80.00
11. Stereo system	-\$ 1, 750.00
	\$ 5, 350.00

- [15] From the pleadings it was unclear which items were destroyed which were damaged and which were stolen. It is also unclear as to whether the loss or damage was a result of the eviction or the tossing of items into the street.

Evidence

- [16] On his arrival in Dominica the claimant was placed in an apartment at Elmshall owned by the second defendant. This apartment had long been rented by the first defendant and used to house visiting technicians and repairmen. The first defendant would pay the rent even when there were no visiting contractors or employees being housed in the apartment.
- [17] As a part of his contract of employment the claimant was required to be responsible for his housing needs. A sum of \$350.00 monthly was deducted from his salary. The first defendant would then send its own cheque in that amount to the second defendant as rent. Mr. Davidson Baron in his witness statement says that the payment arrangement was only to facilitate the claimant and the first defendant is not thereby the tenants of the second defendant.
- [18] Annie Benjamin was the General Manager who had interviewed and employed the claimant she says that upon recruitment she informed the claimant that he was responsible for his own accommodation but that the company was aware that the second defendant had an apartment available as the first defendant had rented it in the past.

- [19] To reassure the second defendant that rents would be paid on time she agreed that rent would be deducted from his salary and paid to the second defendant. She says that she did not tell the claimant that she would be renting the property from the second defendant for the claimants use. The claimant describes the arrangement for rent thus. He says the first defendant provided him with accommodation and deducted \$350.00 per month towards the rent for the apartment. A cheque would be issued to the second defendant with a voucher attached indicating that the salary deduction was being made in respect of rent for the claimant. The events which follow are contested.
- [20] The claimant says that the second defendant demanded that he leave the apartment before the end of the month despite the fact that rent had been paid up to the end of August 2004. He says the supply of electricity was disconnected and the locks were changed. Later the second defendant, his wife and brother-in-law came to the apartment. They began to throw his belongings into the street at Elmshall. The claimant says he made a report to the police but the second defendant told the attending officers that he had not rented his premises to the claimant.
- [21] The second defendant's version, unsurprisingly, is different. He says that he rented the apartment on the ground floor of his home to the first defendant for the use of its employees. It was in his character as employee that the claimant occupied the tenement Upon being informed that the claimants employment with the first defendant had been terminated he told the claimant that he was no longer entitled to occupy the apartment.
- [22] The second defendant says that the claimant requested to remain in occupation as he was looking for another job. He responded that as the first defendant was the tenant, the best he could do was to allow the claimant sufficient time to remove his belongings and that this should be done by 31st August 2004. He denied tossing out any of the claimant's property into the street. He denies damaging or destroying any of the listed items.
- [23] The claimant was cross-examined. His evidence was conflicting. At first he claimed that he was seeking compensation for damage to his property during certain renovations done by the second defendant and not for items tossed onto the street. Then he said he was claiming for both. It is common ground that between the date of his dismissal and the 30th August 2004, certain

renovations and repair work was done to the apartment. This involved the cutting of part of a concrete wall. This was done with the consent of the claimant. In fact he says he assisted the workmen during the renovation

[24] No mention is made in his pleadings for any items damaged during the renovation exercise. At the trial, for the first time, the claimant said that he lost items which were damaged due to the disconnection of the electricity supply. Because both of these are new heads of damage, not foreshadowed by the pleadings I cannot permit the claimant to recover under either head.

[25] In civil proceedings it is always for the claimant to prove his case. Here the claimant wishes to recover special damages. These must be strictly pleaded and particularized. They must be proved. The quality of the evidence by the claimant fell far short of satisfying the court on a balance of probabilities. I do not believe that the second defendant tossed the claimants belongings in the street. On the day in question the claimant made a report to the police. Officers came to the premises. The only item that the claimant could recover was his pair of spectacles which had been left behind in the apartment.

[26] No items like pressure cookers, sandals, sneakers or jewelry were visible on the roadway. The claimant made no report of any missing article except his spectacles. It is unlikely that he would have remained silent had he been so distressed by the loss and damage to his goods. I therefore find that the claimant has failed to prove that he lost the items he listed. As far as the question of eviction without notice goes I find that the claimant was never a tenant of the second defendant. The rents were always paid by the first defendant. The second defendant permitted the claimant to occupy as an employee of the tenant.

[27] I therefore find that there was no relationship of landlord and tenant between the claimant and the second defendant. The claim against the second defendant is also dismissed with agreed costs to the second defendants in the sum of \$3,000.00.



Brian P. Cottle
Justice Brian Cottle
High Court Judge