

SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV 2002/0967

BETWEEN

RICHARD FERDINAND

Claimant

VS

LEEWARD ISLANDS AIR TRANSPORT
(1974) LIMITED

Defendant

Appearances:

Mr. George Charlemagne for Claimant
Ms. Cybelle Cenac for Defendant

2004: March 18
 April 6
 November 4

JUDGEMENT

Introduction

- [1] **EDWARDS J:** Mr. Richard Ferdinand was employed to Leeward Islands Air Transport Limited (LIAT) for 29 years up to the 25th May 2000.

- [2] He was then an Assistant Manager with responsibility for the Traffic Department and Supervisor of the Cargo Shed.

- [3] He was dismissed on the 25th May 2000, for failing to submit a required written report, in response to Ms. Joycie Mederick's written complaint about him on the 4th November 1999. He was 59 years old at the time of dismissal, having had reasonable expectations to retire at 60 years old.

- [4] He has brought this action against LIAT, alleging wrongful dismissal. He contends that having communicated in writing to LIAT that he had no comment to make on the "***Malevolent Accusations***", LIAT had breached his contract of employment by dismissing him summarily.

- [5] He is seeking to recover \$158,750.00 for Special Damages, and General Damages with Interest and Costs.

- [6] LIAT has resisted this claim on the ground that Mr. Ferdinand had been guilty of serious misconduct amounting to insubordination, because he willfully failed to carry out reasonable instructions. LIAT'S defence is that Mr. Ferdinand's summary dismissal was for this reason justified.

- [7] The facts are not in issue. The accusatory letter and the subsequent oral and written communications between the parties speak for themselves.

[8] The issues arising from the facts, law and submissions of Counsel are:-

- (i) **Whether or not Mr. Ferdinand's written responses to the allegations constitute the written report demanded by his superiors? If no –**
- (ii) **Whether or not Mr. Ferdinand by his conduct disregarded an essential condition of his employment contract? If yes –**
- (iii) **Did this warrant summary dismissal? If no –**
- (iv) **What measure of damages is he entitled to?**

[9] The answer to the first issue requires that I consider the exhibited relevant letters between the parties following Ms. Mederick's accusatory letter. I must also focus on the conversation between Mr. Ferdinand and Mr. Eugene Payne immediately before Mr. Payne received Ms. Mederick's letter. Mr. Payne was then the LIAT Sales and Service Manager, and Mr. Ferdinand's Supervisor.

The Allegations and Responses

[10] Ms. Joycie Mederick in 1999 worked under the supervision of Mr. Ferdinand at the LIAT Cargo Department. By letter dated 4th November 1999, she complained that on the 18th October 1999 he had told her that effective from this day overtime would be shared among the staff at the Cargo Shed.

[11] Further, that Mr. Ferdinand was the only other overtime worker and from her understanding, he should not be working overtime and receiving pay for overtime services since he is Management. She enclosed 2 copy documents to substantiate that Mr. Ferdinand was working overtime and receiving pay for such services. These documents disclose that on the 27th and 29th October 1999, Mr. Ferdinand received \$212.00 and \$165.50 respectively, for warehousing Federal Express Cargo on the 26th and 28th October 1999 respectively, from 4:30 p.m. to 7:45 p.m.. These sums represented overtime charges due LIAT plus transportation.

- [12] She also inferred that on the 1st November 1999, Mr. Ferdinand had warehoused cargo as overtime, without tallying the cargo
- [13] Ms. Mederick sought clarification of Mr. Ferdinand's statement that overtime "**will be shared among staff**". She complained that if part of the agreement upon her transfer to the Cargo Shed, was not to allow her to work overtime, then it was incumbent on Management to express this formerly and clearly so that staff would not have to assume what Managers mean when they make decisions: She copied the letter to other persons including the LIAT Area Manager South and the Manager Personnel and Legal Affairs.
- [14] Now it appears from the evidence that Mr. Payne was on leave when Ms. Mederick wrote this letter. Upon returning from his vacation on the 8th November 1999, he had met Mr. Ferdinand at the Airport who had spoken to him about Ms. Mederick's attitude and displeasure concerning the division of overtime among staff.
- [15] Mr. Ferdinand told Mr. Payne then, that he should expect a report from Ms. Mederick complaining that he was working overtime and preventing her from working overtime, even though he was receiving overtime allowance.
- [16] Mr. Ferdinand had explained then that it was necessary from him to work overtime because he was standing in for Mr. Mynns who was on vacation.
- [17] Mr. Payne had told Mr. Ferdinand then that he should not be collecting overtime from other carriers because he was already receiving overtime allowance.
- [18] Mr. Payne went to his office after this discussion with Mr. Ferdinand. He found Ms. Mederick's letter on his desk. He telephoned Mr. Frederick, read the letter to him, and told him to submit a report to him, mentioning all what he had told him at the Airport earlier.

- [19] Mr. Payne's unchallenged evidence was that he told Mr. Ferdinand on the telephone that he should mention what he had told him that Mr. Mynns was on leave and he was standing in for him. In his own words, "***I told him I would handle it from thereon***".
- [20] It appears from the letter dated 22nd December 1999 that Mr. Payne forwarded a copy of Ms. Mederick's letter to Mr. Ferdinand on the 8th November 2004, and asked Mr. Ferdinand to comment.
- [21] Mr. Ferdinand proceeded on his vacation leave on the 15th November 1999 without responding to Mr. Payne's request.
- [22] By letter dated 22nd December 1999 Mr. Payne wrote to Mr. Ferdinand expressing disappointment at Mr. Ferdinand's conduct. Mr. Payne wrote – "***Please let me have your comments immediately so that I may reply to Head Office without further delay***".
- [23] Mr. Ferdinand continued to ignore Mr. Payne's requests. This led Mr. Payne to write the letter dated 31st December 1999 which stated:-
"This is my third request for your report on the circumstances which gave rise to Ms. Mederick's letter to me dated 4th November 1999, a copy of which was forward to you for your perusal.
I do not advise that you continue to ignore my requests.
"You are now asked to furnish me with your report not later than Friday 7th January 2000. . .". (my emphasis)
- [24] The 7th January 2000 passed, and Mr. Ferdinand still continued to ignore Mr. Payne's requests. It was only after Mr. Payne's 4th letter to Mr. Frederick dated 11th January 2000, in which he warned Mr. Ferdinand that "***should you fail to comply, disciplinary action will be taken against you***", that Mr. Ferdinand responded.

[25] By letter dated 13th January 2000, Mr. Ferdinand wrote:-

"First of all, I must apologize to you for not acknowledging your letter . As you are FULLY WELL AWARE, that for the past 28 years since I have been employed with this company, I HAVE ALWAYS HAD GREAT RESPECT FOR MANAGEMENT.

With regards to Ms. Mederick's MALEVOLENT ACCUSATIONS. You will recall this very same matter concerning "overtime" was discussed with you on the morning of November 8th 1999, on your return from vacation at the airport cafeteria, shortly before you received Ms. Mederick's letter.

HAVE MS. MEDERICK'S MALEVOLENT ACCUSATIONS IN SUCH A SHORT TIME, TARNISHED THE GOOD REPUTATION THAT I HAVE BUILT WITH THIS COMPANY OVER THE PAST 28 YEARS?

I most respectfully ask this question, since this appears to be QUITE OBVIOUS, from your four letters demanding that I not only comment on Ms. Mederick's letter, but failing to comply with your request, would result in disciplinary action being taken against me.

I HAVE DONE NOTHING WRONG OR DISHONEST. Therefore I have NO COMMENT to make.

Yours respectfully,

Sgd Richard Ferdinand"

[26] I have made every effort to appreciate Mr. Ferdinand's rational in writing this letter. He testified that up to that point the company had not seen it fit to hold an inquiry into the allegations. He felt that Management should have called Ms. Mederick and himself together *"and ask for each side to give their story and then investigate it".*

He testified ***"It became very clear to me that I was being bullied into making comments on a letter which was procedurally incorrect and to which I could not fathom the reason for comment at that time"***. He considered the request for his comments unreasonable.

[27] Under cross examination, Mr. Ferdinand testified that he felt that Mr. Payne was asking him to comment on the things in Ms. Mederick's letter and Ms. Mederick's allegations which he had already discussed with him. He did not agree that by asking him to comment Mr. Payne was requesting that he give his version of the events. He testified that he was justified in what he wrote in this letter. He felt that there should have been an investigation. He admitted ***"I never thought that what I had written was adequate"***.

[28] Against this background, Mr. Payne, by letter dated 24th January 2000 informed Mr. Ferdinand thus:-

"Your letter of 13th January 2000 is considered to be insubordinate. I have decided to give you one final opportunity to submit the required report.

The question of your reputation and integrity has not arisen.

Your report is needed so that I may forward it to head office along with my covering report. This is purely an administrative procedure.

I have decided to write to you again with the satisfaction that I have spared no effort in giving you an opportunity to comply with my instruction and also to inform you that should you fail to comply immediately, disciplinary action will be taken against you".

[29] By his letter dated 27th January, 2000, Mr. Ferdinand's terse, unyielding response to Mr. Payne's warning was as follows:

"With reference to your letter dated January 24th 2000, requesting a report with regards to Ms. Mederick's MALEVOLENT LETTER.

As stated in my letter dated January 13th 2000, I have no comments to make on the matter”.

- [30] I have appended to this Judgment, copies of the remaining relevant letters themselves dated ***February 10 2000, February 24 2000, March 8 2000, April 20 2000, May 23 2000, and June 20 2000***, for their full effect.
- [31] Learned Counsel Mr. Charlemagne has argued that Mr. Ferdinand did comply with the request to comment on Ms. Mederick’s letter. That it was irrelevant in the circumstances whether Mr. Payne thought his response was insubordinate abrupt or succinct. That in the absence of any clear instructions as to what his comments were to address, or what the report should contain, and any established reporting procedure existing at LIAT, it was left to Mr. Ferdinand to comment as he saw fit. That having commented as he saw fit, that should have been an end to the matter.
- [32] Mr. Charlemagne has described the matter as a mere ***“clash of egos or personality”*** between Mr. Payne and Mr. Ferdinand.
- [33] Mr. Charlemagne’s closing submissions effectively emphasized the evidence of Mr. Ferdinand that Mr. Payne was motivated by malice.
- [34] Mr. Ferdinand testified that Mr. Payne never liked him, and had always had an antagonistic attitude towards him. Mr. Ferdinand related incidents which led him to that view. He admitted however, that Mr. Payne was instrumental in the employment of his sick daughter by LIAT. Mr. Ferdinand’s 34 years old daughter has Lupus disease.
- [35] On the other hand, Mr. Payne denied ever harbouring any malice towards Mr. Ferdinand. Mr. Payne was cross-examined extensively about his generous attitude and decisions concerning other employees of LIAT who had misconducted themselves and were never dismissed.

- [36] I do not find it necessary to narrate any further this aspect of their evidence. It is sufficient to state that I have taken into account all of the evidence and the submissions of both Counsel. Accepting the evidence of Mr. Payne, I find that he was not motivated by malice when he requested Mr. Ferdinand to write a report, commenting on the incidents referred to in Ms. Medericks's letter.
- [37] I accept Mr. Payne's undisputed evidence that he had told Mr. Ferdinand on the telephone, that he was to comment on the incidents mentioned in Ms. Medrick's letter, which they had previously discussed. In addition to this, the reason for and nature of the report were clearly stated in Mr. William Tomlinson's letter to Mr. Ferdinand dated 24th February 2000, and Mr. Payne's letters to Mr. Ferdinand dated 31st December 1999, 24th January 2000 and 20th April 2000.
- [38] In my Judgment, Mr. Ferdinand by his responses deliberately ignored the reason why the report was requested and what the report should address. I cannot reasonably and logically conclude in the face of this evidence that Mr. Ferdinand's persistent refusal to comment on what he perceived were malevolent accusations, sufficed as the requested report. I therefore find that he failed to comply with the order of his employer to submit a report. I shall now move on to consider the second issue.

Noncompliance and The Conditions of Employment

- [39] In the absence of any written contract between the parties, I look to the Contracts of Service Act No. 14 of 1970 and the common law of England governing Master and Servant and Contracts of Employment to decide this claim.
- [40] The law is that where summary dismissal is claimed to be justified as LIAT has claimed in this case, the question is ***“. . .whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service. It is, no doubt therefore generally true that willful disobedience of an Order will justify summary dismissal since willful***

disobedience of a lawful and reasonable Order shows a disregard of a condition essential to the contract of service, namely the condition that the servant must obey the proper Orders of the Master, and that unless he does so, the relationship is so to speak, struck at fundamentally.”: (PER Lord Evershed M.R. in *Laws –vs- London Chronicle (Indicator Newspapers) Limited* [1959] 1 WLR. 698 at 700) (My emphasis).

- [41] Lord Evershed continued at page 701 “*. . .One act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; . . . the disobedience must at least have the quality that it is “willful”, it does (in other words) connote a deliberate flouting of the essential contractual conditions.*”
- [42] SECTION 7 (1) of the Contracts of Service Act is declaratory of the common law. It refers to Section 6 which provides by Section 6 (3) (d), that a minimum of 6 weeks notice is required to be given by an employer, to terminate the employment of an employee who has been continuously employed for more than 10 years.
- [43] SECTION 7 (1) states –
- “(1) Notwithstanding the provisions of Section 6, a contract of service terminated for any of the following reasons shall not give rise to any liability to pay wages (or make payments in lieu of notice): -*
- (a) *Any reason for which the employer would be entitled at law to terminate a contract of service without giving due notice (which shall include the following circumstances).*
- (i) *where an employer is guilty of misconduct whether in the course of his duties or not, inconsistent with the fulfillment of the express or implied conditions of his contract of service;*
- (ii) *for willful disobedience to lawful orders given by the employer;*

- (iii) ...
- (iv) ...
- (v) ...”.

[44] In dealing with this issue, Counsel Mr. Charlemagne’s approach was to focus on:

- (a) the absence of any standard procedure for dealing with such matters;*
- (b) the previous discussions Mr. Ferdinand had had with Mr. Payne on the matter;*
- (c) Mr. Payne’s communication by letter clearing Mr. Ferdinand of any wrong doing in the management and operation of LIAT’s business;*
- (d) the absence of any evidence to prove that LIAT had detrimentally suffered from Mr. Ferdinand’s conduct; and*
- (e) the fact that Ms. Mederick had a questionable reputation and work ethics which called for management’s skepticism and caution in considering her allegations.*

[45] Learned Counsel in substance argued that the insistence for the report to be in a particular format was arbitrary and unreasonable. That the disagreement between Mr. Payne and Mr. Ferdinand was not insubordination. That in such circumstances Mr. Ferdinand’s conduct was not behaviour repudiating the contract or the essential terms therein.

[46] Learned Counsel Ms. Cenac saw it differently. She argued that Mr. Payne’s request was guided by LIAT’s Company Policy. It was not an arbitrary request by Mr. Payne she submitted.

[47] Mr. Payne testified that the purpose of the report was important because the allegation regarding overtime appeared to reveal a deficiency in LIAT’s operating system . He explained that as a result of the severe financial hardships LIAT has

been experiencing due to ferocious competition, LIAT had taken a decision to tighten its belt and obtain reports on all matters affecting the Company, reporting at all levels, be it clerical, supervisory, managerial, or assistant management. This policy was to allow LIAT to focus on any deficiencies in the system.

[48] It would seem from Mr. Ferdinand's evidence and posture at the material time that he was either not aware of this policy decision of LIAT, or that he willfully and defiantly ignored it.

[49] Even if he was, ignorant of LIAT's policy decision, in my view this cannot avail Mr. Ferdinand in the existing circumstances. It provides no justification for Mr. Ferdinand's defiance.

[50] I find from the evidence that LIAT's request for a written report was a reasonable and lawful order. As part of the Management team Mr. Ferdinand ought to have appreciated that such a request was LIAT's method of inquiring into the allegations. Having already received Ms. Medrick's version of the events, LIAT was simply asking Mr. Ferdinand to supply them with his written account of the incidents referred to by Ms. Mederick.

[51] I agree with Learned Counsel Ms. Cenac's assessment of Mr. Ferdinand. Unfortunately for him, blinded by over sensitivity and preconceived notions as to how LIAT ought to have handled the situation, with a presumptuous attitude he defiantly disobeyed LIAT's order to his detriment.

[52] I have applied Lord Evershed's statement of the law (mentioned at paragraph 40 of my Judgment) to the present facts.

[53] I therefore conclude that it was obviously an essential condition of the employment contract between the parties that Mr. Ferdinand must obey the proper orders of LIAT regardless of his personal opinion about such orders.

His conduct was tantamount to a deliberate flouting of management's order. It was disobedience and misconduct, inconsistent with the fulfillment of the implied conditions of his employment contract in my judgment.

[54] It is not every act of willful disobedience or misconduct which will warrant an employer summarily dismissing his employee.

[55] I must now consider the fourth issue. I must determine whether Mr. Ferdinand's disobedience and or misconduct was of such a degree as to justify his summary dismissal.

The Quality of Behaviour Warranting Summary Dismissal

[56] Learned Counsel Mr. Charlemagne focused on Mr. Ferdinand's long unblemished service record with LIAT. He questioned whether Mr. Ferdinand's perceived non-compliance was so drastic as to cause LIAT to use the exceptional measure of summary dismissal Counsel garnered support for his submission from the Editorial note to the headnote in **Jupiter General Ins. Co. Limited -vs- Ardeshir Bomarji Shroff** [1937] 3P.C 36 which states that "*. . .an isolated act of neglect or misconduct will not justify summary dismissal unless attended by serious consequences*".

[57] Mr. Charlemagne argued that Mr. Ferdinand was seeking to protect his own interest and to preserve his right against self-incrimination by keeping his response of January 13, 2000 to Mr. Payne as succinct as possible.

[58] Counsel canvassed the view that upon receiving Mr. Ferdinand's reply, LIAT's Manager could have taken any action he thought necessary against Mr. Ferdinand including suspending him and or demoting him if necessary, since Mr. Ferdinand's conduct had not impeded the operations of LIAT's business.

- [59] By Mr. Payne's letter dated 20th April, 2000 to Mr. Ferdinand, LIAT did in fact suspend him for one month without pay from the 25th April 2000 to the 24th May 2000.
- [60] By this same letter Mr. Payne informed Mr. Ferdinand: ***"You will be required to submit the required report on or before the end of your period of suspension. Failure to do so will be considered gross insubordination for which you will be dismissed without warning"***.
- [61] Mr. Ferdinand wrote his final recalcitrant letter dated 23rd May 2000 to Mr. Payne, instead of submitting the required report. Consequently he was dismissed effective 25th May 2000 after he reported for work.
- [62] There is no fixed rule of law defining the degree of misconduct which will justify dismissal: (**Clouston and Company Limited –vs- Corry** [1906] AC. 122. PER Lord James of Hereford at page 129).
- [63] Both Counsel relied on the authority **Jupiter General Insurance Company Limited –vs- Ardeshir Bomanji Shroff** [1937] 3P.C. 67. This case provides the authority for saying that there must be serious consequences flowing from one incident of misconduct in order to justify summary dismissal.
- [64] Though this was a case where the employer was summarily dismissed for committing a single act of negligence, the guideline nevertheless enunciated by Lord Maugham at pages 73-74 is applicable for the present case.
- [65] Lord Maugham stated that in assessing whether or not the misconduct of the employer was such as to interfere with and prejudice the safe and proper conduct of the business of the company, thereby justifying immediate dismissal, it must be remembered that the test to be applied must vary with the nature of the business, and that decisions in other cases are of little value.

[66] Among the many other cases Mr. Charlemagne referred to in advancing his argument, was the case **Gulstone –vs- Anchor Life Insurance Company Limited** [1976] 27 W.I.R. 68.

[67] There, Johnson Ag. J. in his Judgment referred to some relevant principles set out in the Encyclopedia of Labour Relations Law Vol. I by Hepple and O' Higgins at page 1129, for understanding the degree of misconduct necessary to establish a right to dismiss summarily.

[68] Some of these principles are as follows:

- “(1) The modern test is basically whether the conduct by the employee about which the employer complains is a breach of an important term of the contract of employment.*
- (4) Breach of an important term now a days will not necessarily give rise to a right of summary dismissal if it occurs in such circumstances that the employee has a reasonable excuse of justification.*
- (5) Single acts of misconduct are somewhat less likely to give rise to a right of summary dismissal than is a persistent pattern of misconduct; in the case of a singular act of misconduct a record of unsatisfactory behaviour may tip the balance and lead the Judge to the view that there are grounds for summary dismissal.*
- (6) What is to be regarded as an important term will also depend upon the nature of the business or industry and the position of the employee.*
- (9) Whether misconduct is sufficient to justify summary dismissal is not dependent upon proof that such misconduct has had in fact serious consequences; the test is the nature of the misconduct itself.”*

[69] Also of some help to me in deciding this issue, is a persuasive Canadian authority I discovered, reported at paragraph 1721 in the Digest Vol. 20 (1) Annotated British Commonwealth and European Cases 2nd Reissue (1996).

[70] In Neudorf –vs- Sun Valley Co-operative Limited [1994] 9 WWR 23 (CAN) there is enumerated some elements which must exist for willful disobedience to constitute cause for dismissal. They are –

- “(a) the disobedience must be particularly serious, if it is no more than an isolated act;*
- (b) the disobedience must so damage the relationship that it cannot continue;*
- (c) the employee should have understood that he or she risked being terminated; and*
- (d) there must have been no reasonable explanation for the disobedience.”*

[71] Learned Counsel Ms. Cenac quite rightly referred to the contents of Mr. Tomlinson’s letter to Mr. Ferdinand dated 24th February 2000 in stressing the seriousness of Mr. Ferdinand’s willful disobedience and the damage that it had done to the employment relationship between the parties.

[72] Mr. Tomlinson had in that letter informed Mr. Ferdinand of the seriousness and implications of his refusal to obey the order to submit the report. He wrote –

“I find it very distressing that someone as senior as you and holding a management position could take the position of flatly refusing to submit a report on an incident which occurred at a time when you were the management official in charge and have come to the conclusion that:

- (a) you are not aware of the seriousness of the position in which you have placed yourself and/or;*
- (b) you are not conscious of the effect of the position on your future ability and suitability to manage staff under your supervision if it becomes known that you have acted in a manner for which such staff would be subject to disciplinary action and/or;*

(c) *you are not aware of the untenable situation you place yourself in regarding your further relationship with your direct supervisor if you cannot be relied upon to provide reports when requested and to give the necessary support when required.”*

[73] It is evident from this letter that several months before his dismissal, LIAT’s Management viewed his non compliance as very serious. He also knew that he was risking the termination of his employment, yet he chose to remain defiant.

[74] Though Mr. Ferdinand may have had a previously unblemished record at LIAT, and this incident may have been a single act of disobedience and or misconduct, Mr. Ferdinand by his letters and non-compliance challenged the authority of Mr. Payne, Mr. Tomlinson and LIAT, and this was serious in my view. His evidence affords no reasonable explanation for his disobedience.

[75] I therefore conclude that given the nature of the disobedience and the duties of Mr. Ferdinand the relationship between the parties was severely damaged. His conduct could no longer engender the confidence of his employers in him in all the circumstances. In my judgment his dismissal was justified.

[76] I hold that LIAT is not liable to pay him any money for salary or notice period or any damages whatsoever pursuant to Section 7 (1) (a) of the Contract of Service Act.

[77] I enter Judgment for the Defendant with costs to be agreed on by the parties pursuant to PART 65 – 5 (2) (b) (ii) of the Civil Procedure Rules.

[78] Where the Parties cannot agree on the costs that the Claimant should pay to the Defendant, the Court will determine the value of the Claim.

Dated this 2nd day of November, 2004

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OLA MAE EDWARDS
High Court Judge

APPENDIX

- A - LIAT Memo from Mr. Eugene Payne to Mr. W. Tomlinson dated 10th February 2000.***
- B - Letter from Mr. Willson E. Tomlinson to Mr. Richard Ferdinand dated 24th February 2000.***
- C - Letter from Mr. Richard Ferdeinand to Mr. William Tomlinson dated 8th March 2000.***
- D - Letter from Mr. Eugene Payne to Mr. Richard Ferdinand dated 20th April 2000.***
- E - Letter from Mr. Richard Ferdinand to Mr. Eugene Payne dated 23rd May 2000.***
- F - Letter from Mr. Eugene Payne to Mr. Richard Ferdinand dated 20th June 2004.***