BARBADOS

[Unreported]

IN THE
SUPREME COURT OF JUDICATURE

COURT OF
APPEAL

Civil Appeal
No. 18 of 2003

BETWEEN

JAMES
LIVINGSTON EASTMOND *Appellant*

AND

RAYSIDE
CONCRETE WORKS LIMITED *Respondent*

BEFORE: The Honourable Peter
D.H. Williams, Chief Justice (Ag.), the Honourable Sandra P. Mason and the

Honourable Andrew D. Burgess, Justices of Appeal

2012: 28 February; 16 March; 30 April; 25 May; 8 November

Mr. Bryan Weekes of Weekes Kissoon Deane for the Appellant

Mr. Leslie Haynes, Q.C. for the Respondent

JUDGMENT

PETER
WILLIAMS CJ (Ag.)

I.
INTRODUCTION

[1] This case has an unfortunate history. Mr. James Eastmond (Eastmond), the appellant, was employed as a truck driver for 15 complete years with Rayside Concrete Works Ltd. (Rayside), the respondent, prior to the cessation of his employment over 20 years ago. The appellant was unsuccessful in his claim for compensation against the respondent both before the Severance Payments Tribunal and in the High Court. Nine years ago he appealed to this Court. Resolution of the appeal requires a careful examination of the facts and the proceedings in order to arrive at a decision that is just to the parties.

II. FACTS

[2] Eastmond was employed by Rayside from 2 December 1976 to 8 April 1992. He was "laid off" for 6 weeks between December 1976 and February 1977 when he returned to work. This fact was mentioned by the appellant in his evidence but has no bearing on the case except that there was no evidence of his being laid off at any subsequent time. He worked continuously from 1977 to 1992.

[3] On 8 April 1992, Mr. Walcott (presumably the manager or supervisor of Rayside) told Eastmond that as the truck was "down" (the axle was broken) he had to go home. Mr. Walcott told him to go to the National Insurance Office and that when Rayside "got another truck" the company "would call" him. He was evidently given a Termination of Services/Lay-Off Certificate, which was stamped by the National Insurance Office dated 21 April 1992. The Certificate is the means by which a claim for unemployment benefit is made. The employer is required to state the "reason for unemployment" and the "expected date of re-employment". Rayside stated in answer that the truck was "under repairs" and that the date of re-employment was "indefinite".

[4] On 13 July 1992, Eastmond wrote a letter to Rayside stating that on 8 April 1992 he "was laid off from work" and had not since been re-employed. He was therefore claiming a severance payment. Rayside did not reply to the letter.

[5] On 7 April 1993, Eastmond wrote a second letter to Rayside stating that on 8 April 1992 his "employment was terminated" and that in the circumstances he was claiming a severance payment. Rayside did not reply to the letter.

III. PROCEEDINGS

(a) *Severance Payments Tribunal*

[6] Eastmond filed Case No. 508/253/96 (date not stated) against Rayside before the Severance Payments Tribunal claiming a severance payment. The first hearing before the Tribunal took place on 5 November 1996, four years after the cessation of Eastmond's employment. The reason for the delay was never explained. The Tribunal comprised the Chairman, Mr. C. E. Lashley (subsequently Q.C.), Mr. P. Parris and Mr. C. Murrell. Eastmond was not represented at this hearing and apart from the basic facts given above no attempt was made by the Tribunal to obtain from him evidence on the details of his work with Rayside and the operations of the company with particular reference to the circumstances surrounding the cessation of his employment. Eastmond did say that the truck was repaired but that someone else was driving it; no evidence was given as to the time when this took place. No one appeared for Rayside at the hearing. The case was adjourned to 11 December 1996 for Mr. Edgar Norville to appear for Rayside; his position in the company was never stated. On 11 December 1996, Mr. Norville did not appear and the hearing was again adjourned to 4 February 1997 for him to be re-summoned.

[7] On 4 February 1997, Mr. Norville did not appear in spite of the fact that he was summoned with a warning. The hearing was yet again adjourned to 11 March 1997. The

Chairman stated significantly:

"We have a problem here, Mr.
Eastmond, we are trying to find out whether you were laid off from your job in
1992 or whether you were dismissed".

It is the
contention of this decision that though the Chairman identified the issue that the
Tribunal had to decide it was never investigated so as to arrive at an informed
decision on the same.

[8] On 11 March 1997, Mr. Norville again did
not attend and the hearing was adjourned to 22 April 1997 when Mr. Norville did
attend. However, on this occasion the
Tribunal was not fully constituted as Mr. Murrell was absent and no formal
evidence was taken. Nevertheless, Mr.
Norville did say that he knew that the appellant worked "some time" for the
respondent and that he searched for the appellant's lay- off certificate but
could not find it. The matter was
adjourned to 13 May 1997.

[9] On 13 May 1997, Mr. Norville did not
appear but the parties for the first time were represented by counsel; Mr.
Bryan Weekes for Eastmond and Miss Elneth Kentish (subsequently Q.C.) for
Rayside. There is no record of the
Tribunal making an inquiry in relation to the absence of Mr. Norville although
it had adjourned the matter on five occasions for him to give evidence.

[10] Mr. Weekes requested to be heard, but the
Chairman stated that the case had "run its course" and that the Tribunal had
decided to give its decision on that date.
The Chairman said:

"According to the
Act, the limitation period has long passed…Mr. Eastmond, we have to dismiss
your case because you have filed out of time.
You should have brought your contract to an end. Case dismissed."

The Tribunal subsequently gave
lengthy and different written reasons for dismissing the claim.

[11] The written decision of the Tribunal
accepted uncritically that Eastmond had been laid off. The Tribunal held in the circumstances that
he had not complied with ***section 6(3)(a)*** of the ***Severance***
Payments Act, Cap. 355A (the ***Act)*** by serving a notice of intention to
claim and in particular by not formally terminating his contract of
employment. The Tribunal concluded its
reasons for dismissing the application by stating the following:

> "On the facts
> there was no termination for redundancy on 8 April 1992. At that time, **the contract** between the employer and the applicant **was suspended** because the truck was
> undergoing repairs. The Lay-Off
> Certificate states that there was no dismissal.
> It was therefore left to the applicant to terminate his contract in
> accordance with the provisions of subsection 3 of section 6. Having failed to do this, the application

cannot succeed. This issue alone disposes of the case." (Emphasis added.)

The Certificate did not state that there was no dismissal; it stated that Eastmond was not dismissed because of misconduct.

[12] Without elaborating, this Court has obvious concerns about the hearing by the Tribunal. Eastmond was not questioned in any meaningful way in relation to the cessation of his employment. Further, no evidence was given on behalf of Rayside; Mr. Norville appeared when the Tribunal was not properly constituted and never returned to give evidence.

[13] The Tribunal was content in its oral reasons to dismiss the application on the basis that it was filed out of time. However, the written reasons of the Tribunal stated that the application was filed in time. We should state that this was not an issue in the appeal. The written reasons of the Tribunal were based on the non-compliance by Eastmond of the formal requirements of the lay-off provisions in ***section 6(3)(a)*** of the ***Act***. On that basis it was essential for a representative of Rayside to have given evidence in order for the Tribunal to objectively determine the reason for the cessation of employment.

(b) High Court

[14] On 13 July 1997, Eastmond being dissatisfied with the decision of the Tribunal appealed on a question of law to the High Court under ***section 39*** of the ***Act*** by Notice of Originating Motion in compliance with ***Order 56*** of the ***Rules of the Supreme Court, 1982 (RSC)***. There is no explanation for the fact that the case was not heard until 6 March 2000. Mr. Weekes for the appellant made the same submissions to the High Court that he made to this Court, which we discuss in greater detail below. In essence he submitted that "the appellant had been constructively dismissed within the meaning of the ***Act*** by having been laid off by the respondent for an unreasonably long time". He did not agree that the appellant was laid off and was not relying on the lay-off provisions. Miss Kentish relied on the reasons of the Tribunal in that the appellant did not comply with the lay-off provisions in ***section 6(3)(a)*** of the ***Act*** by giving notice of the termination of his employment. On 2 October 2003, ***Greenidge J*** gave his decision. He (like the Tribunal) did not take into account the fact that no evidence was given on behalf of Rayside in opposition to Eastmond's application for a severance payment. He rejected the appellant's submissions and held that on the facts the appellant could not have been deemed to be dismissed by reason of redundancy; he agreed with the respondent's submissions that the appellant was laid off and that although he gave notice of his intention to claim a severance payment he did not also give notice to terminate his employment as required by ***section 6(3)(a)*** of the ***Act***. He dismissed the appeal and ordered the appellant to pay costs.

IV. COURT OF APPEAL

(a) Appeal

[15] The appellant's Notice of Appeal was filed on 30 October 2003. The ground of appeal was against the judge's holding that the appellant was entitled to a severance payment under the terms of the ***Act***. We do not know the reason why the appeal did not come on for hearing until 2012.

(b)
Preliminary point

[16] Mr. Haynes Q.C. did not appear for Rayside in the High Court proceedings. He stated that he had been retained in the appeal shortly before the hearing on 16 March 2012, which continued on 30 April 2012. He nevertheless verbally raised the issue of how did the case "get into the High Court and move from the High Court here". He stated that it was always his understanding that appeals from the Severance Payments Tribunal were heard by the Court of Appeal.

[17] Mr. Weekes stated that the procedural point was not taken in the High Court by counsel or by the judge of his own motion. ***Section 39*** of the ***Act*** (commenced on 1 January 1973) which gave a right of final appeal on a question of law to the High Court from decisions of the Severance Payments Tribunal was substituted by ***section 63*** of the ***Supreme Court of Judicature Act, Cap, 117A*** (commenced on 4 November 1991). ***Section 63*** provides that:

"Where under any enactment passed or made **before the commencement of this Act**, it is provided that an appeal, either by way of case stated or **upon a point of law only**,

(a) **lies** from any inferior court **to the High Court** or to a judge of the Supreme Court, and

(b) **the decision of that court or judge is expressed by such enactment to be final,**

that appeal lies instead to the Court of Appeal." (Emphasis added.)

The Court of Appeal was therefore substituted for the High Court as the Court exercising the right of final appeal from decisions of the Severance Payments Tribunal. We bear in mind that the right of appeal to

this Court is final and on a point of law only.

[18] Reference was also made to ***section 54(1)(d)*** of the said ***Supreme Court Act***, which provides that no appeal lies to the Court of Appeal from an order of the High Court where it is provided that the order made is to be final. This provision would cover enactments passed **after** but not before the commencement of the ***Supreme Court Act***. An example of an enactment passed after is the ***International Commercial Arbitration Act, 2007-45***, which came into operation on 19 January 2009; it provides by ***section 14(5)*** that a High Court decision specified therein "is not subject to appeal".

[19] Mr. Haynes did not take issue with Mr. Weekes' response. The respondent filed no notice of preliminary objection to the hearing in compliance ***Order 59, Rule 10(3)*** of the ***RSC***. Mr. Haynes stated that he had no objection to Mr. Weekes proceeding with the hearing. In the circumstances, we have not had to consider this matter in detail. Nevertheless, we are satisfied that we have jurisdiction to entertain the appeal. We also consider that we are not prejudiced in determining this appeal in view of what transpired in the High Court proceedings.

[20] The High Court arrived at the same decision as the Tribunal by the same reasons. This Court would therefore be in a similar position as if this were an appeal direct from the Tribunal. In the event that the proceedings before the High Court were irregular or a nullity and that the proceedings before this Court may thereby also be affected, we exercise our discretion to waive any procedural irregularity in any way where this is required in the interest of justice. ***Order 59, Rule 4(1)*** specifically provides for the situation as follows:

"Without prejudice to its powers under Order 3, rule 5, [Extension of time] the Court may direct a departure from the rules of this Order **in any way where this is required in the interest of justice**". (Emphasis added.)

[21] The new ***Supreme Court (Civil Procedure) Rules, 2008 (CPR)*** provide similarly. ***Rule 73.4*** permits the Court in proceedings commenced before the ***CPR*** came into operation to nevertheless take into account the principles set out in the ***CPR*** which include the general power of the Court under ***Rule 26.4*** to rectify matters where there has been a procedural error and to enable the Court to deal with cases justly. This Court is therefore given a wide power. We therefore of our own motion in the very special circumstances of this case exercise the Court's power in the interest of justice to properly hear and determine the appeal.

(c) The issue for decision

[22] ***Section 3(1)*** of the ***Act*** gives the employee a right to a severance payment in three situations where the employee:

is dismissed by his employer because of redundancy; or

s laid off or
kept on short-time to the extent specified
in subsection (1) of section 6 and complies with the requirements of
that section; or

s dismissed by
his employer because of a natural
disaster".

Only *(a)* and *(b)* above are in contention in this case. The issue is whether the appellant was dismissed under *(a)* or *(b)*.

(d) Appellant's submissions

[23] Mr. Weekes submitted that the appellant was constructively dismissed under *(a)*. If the appellant was dismissed under *(a)* he did not have to comply with the requirements in *(b)*. Mr. Weekes relied on ***section 19*** of the ***Act*** in support of the submission that Eastmond had been constructively dismissed. ***Section 19*** provides for an implied or constructive termination of contract by the employee because of any act on the part of the employer or any event affecting an employer. Mr. Weekes submitted that the act of the respondent in sending home the appellant without work entitled the employee to terminate his employment and to a severance payment under ***section 3(1)(a)*** of the ***Act***. He was not relying on the right to a severance payment based on the lay-off provisions under ***section 3(1)(b)*** of the ***Act***. Eastmond therefore did not have to comply with the formal requirements (specifically, termination of his contract of employment) of the lay-off provisions in ***section 6(3)(a)*** of the ***Act***. Mr. Weekes accepts that if he was dismissed under ***section 3(1)(b)*** of the ***Act*** there had to be strict compliance with the lay-off provisions.

[24] He relied in support of his submissions on a decision of the (English) Employment Appeal Tribunal; ***A. Dakri & Co. Ltd. v. Tiffen And Others [1981] I.C.R. 256 (Dakri)***. Mrs. Tiffen and other workers were employed in Dakri's rag trade business. The contracts of employment expressly provided that the employer was entitled to lay-off the employees temporarily and without pay if there was a shortage of work. Mrs. Tiffen and Others were laid off and after four weeks without work or pay and without hearing from their employer they claimed a redundancy payment but failed to give notice terminating their employment as required under the lay-off provisions of the Redundancy Payments Act 1965 (on which our ***Act*** of 1971 was modelled). The Employment Appeal Tribunal agreed with the trial Tribunal that the workers' legal position was to be considered taking into account the terms of the contract and not the statutory lay-off provisions. The lay-off without remuneration was for more than a reasonable period in the light of the contract and the workers were entitled to terminate their contracts. They were constructively dismissed. The employer's conduct amounted to the expression of an intention not to be further bound by the contracts so that the workers were entitled to and did treat their contracts as at an end. There was a fundamental breach of the terms of their contracts by reason of redundancy and they were entitled to a redundancy payment. The formal lay-off provisions of the Redundancy Act were therefore not applicable. The workers had been constructively dismissed within the meaning of the general dismissal provisions of the said Act.

[25] We agree with the judge that ***Dakri*** "turns on its own facts" and that the facts in the instant case do not

give "rise to the question of constructive dismissal". However, there are aspects of ***Dakri*** which we discuss below that are of some help in resolving this case.

(e) Respondent's submissions

[26] Mr. Haynes submitted that the appellant was laid off under ***section 3(1)(b)*** of the ***Act***. He relied on the judgment of the High Court and the principles therein including the case of ***Vennard v. Deal (1969) 4 ITR 315 (Vennard)***. He adopted the same position as the Tribunal and the High Court, namely, that Eastmond had been laid off but had not complied with the statutory requirement of formally giving notice of the termination of his employment. ***Vennard*** was laid off and gave his employer notice of his intention to claim a redundancy payment but he did not terminate his contract of employment as required by the Redundancy Payments Act, 1965. The (English) Industrial Tribunal held that the "complicated and highly technical" requirements of the Act had not been complied with and the employee was therefore not entitled to a redundancy payment in respect of the lay-off. It was submitted that the position in the instant case was similar to that in ***Vennard*** and that Eastmond was therefore not entitled to a severance payment.

(f) Discussion

[27] The case proceeded before the Tribunal and the High Court on the basis that Eastmond was laid off from his employment under ***section 3(1)(b)*** of the ***Act***. The primary facts concerning the cessation of employment which were given by the appellant were not disputed. The only question was the proper inference to be drawn from those facts. As ***Lord Denning M.R.*** said in a similar case, ***Marriott v. Oxford Co-operative Society Ltd. [1969] 3 All E.R. 1126*** at ***1128*** the proper inference is a question of law with which the Court of Appeal can interfere. We are of the view that the proper inference from the facts is that Eastmond was not laid off on 8 April 1992 but dismissed. There was no history of Eastmond being laid off; in fact the evidence was that he was laid off only once for 6 weeks soon after he was first employed. There was no evidence that on 8 April 1992 Rayside laid off Eastmond. He was told to go home and that he would be called back when the company got "another" truck. The Termination of Services/Lay-Off Certificate made no reference to Eastmond being laid off. Instead, the Certificate stated that the expected date of re-employment was "indefinite". The only reference to being laid off was in Eastmond's first letter to Rayside but his second letter referred to his contract being terminated. In the circumstances the case of ***Vennard*** does not assist as the statutory requirement of the employee to terminate his or her employment in a case of lay-off is not disputed or in issue in the instant case.

[28] In this jurisdiction when an employee is laid off, for example, a hotel worker because the hotel is closed for the off-season or for refurbishment, the worker is generally told the date on which to return to work. The employee is not entitled to take alternative employment but must be free to resume employment. If the employer fails to provide work on the stipulated date, the employee can serve "a notice of intention to claim" and if the employer does not serve a "counter-notice" the worker must terminate his contract of employment in accordance with ***section 6(3)(a)*** of the ***Act***. The circumstances of this case did not constitute a lay-off in the legal sense. As the Appeal Tribunal said in ***Dakri*** any lay-off had to be temporary; "if it were not, lay-off would mean dismissal". In the circumstances, the period for which the appellant was sent home was "indefinite", he was never called back to work. Except where there is an agreement to the contrary in a contract of employment, the employer has no general power, apart from that in the statutory provisions, to

lay-off the employee. Someone else was given the lorry to drive; Eastmond therefore lost his job. His employer clearly refused to allow him to resume work. His letters to his employer were not answered. The employer no longer regarded itself bound by the contract of employment. The words and conduct of Rayside were consistent with the termination of Eastmond's employment because of redundancy under ***section 3(1)(a)*** of the ***Act***.

It is good practice for the employer to inform the employee precisely of his or her status on cessation of the employment. The learning in this area of the law suggests that account must be taken of the realities of the employment relationship. This was a clear case of dismissal because of redundancy.

[29] The ***Act*** provides in ***section 3(3)*** that the employee shall be deemed to be dismissed because of redundancy in certain circumstances:

"For the purposes of this Act, an employee who is dismissed shall be deemed

to be dismissed because of redundancy if his dismissal is wholly or mainly attributable to

(i) … or;

the fact that the requirements of that business for employees to carry out work of a particular kind…have ceased or diminished …".

The employee was surplus to the requirements of the business as evidenced by the fact that someone else was driving the truck; Eastmond was redundant.

[30] ***Dakri*** was a case of a written contract and breach of that contract resulting in constructive dismissal. The Appeal Tribunal held that the employer's conduct after the employees' had been temporarily laid off without pay amounted to constructive dismissal by reason of redundancy. Constructive dismissal occurs only where the employee terminates the contract of employment in circumstances such that the employee is entitled to terminate it by reason of the employer's conduct in making continued employment intolerable for the employee. Eastmond, on the other hand, had no written contract and did not terminate his contract; his employer effectively did so by sending him home indefinitely. The commonality between the two cases is that in both cases (as we hold in this case) the employees were entitled on the facts to bypass the elaborate and highly technical statutory lay-off provisions and claim straight dismissal or constructive dismissal by the employer because of redundancy. In both cases the employees did not have to comply with the statutory lay-off provisions in order to succeed.

[31] We are fortified in the correctness of our conclusion that Eastmond was dismissed because of redundancy also by the fact that Rayside did not defend the application; no evidence was given on behalf of the company challenging Eastmond's right to a severance payment. In the circumstances of this case Eastmond

was "deemed" to be dismissed because of redundancy. If the employee gives *prima facie* evidence suggesting that he or she has been dismissed because of redundancy, the burden of proof on a balance of probabilities is then on the employer to contradict that evidence, failing which the employee will generally be deemed to be dismissed because of redundancy. It was therefore incumbent on Rayside to give evidence in order to succeed in rebutting Eastmond's evidence and so as to satisfy the Tribunal on the balance of probabilities that the dismissal was not due to redundancy: see ***"The Law of Redundancy"*** by ***Cyril Grunfeld (First Edition, 1971)*** at ***page 72***. It is a matter of practical sense that the reason for a dismissal is far more likely to lie in the knowledge of the employer than in that of the employee. The employer gave no evidence and therefore effectively chose not to defend the claim.

V.
DISPOSAL

[32] It follows that the appellant is entitled to a severance payment. We were not provided with a figure and the award would take no account of inflation over the years. We have to consider the questions of interest and costs. The appellant has been denied his severance payment for over twenty years. The delay has been horrendous. Nevertheless, further delay would be caused by an attempt to apportion the cause of the delay between the parties (and the system). In the circumstances, we have decided to award interest on the severance payment only from the date of this judgment at the rate of 6% per annum to the date of payment.

[33] An award of costs would require a consideration of the appropriate order on costs in this Court and the High Court. The general rule is that the court will order the unsuccessful party to pay the costs of the successful party. The appellant would normally be entitled to costs in this Court and the High Court. We have not heard submissions on the legal status of the High Court proceedings and it has not been necessary for us to definitively determine the same. A recent decision of the ***Caribbean Court of Justice (CCJ)*** in ***Roseal Services Limited v. Challis [2012] CCJ 7 (AJ)(3 October 2012)*** *at* ***[21], [52]*** *and* ***[58]*** held that where there was no jurisdiction in this Court to hear an appeal from a High Court decision granting unconditional leave to appeal, the order and rulings of this Court would be voidable. The ***CCJ*** set aside the order and rulings and struck them out including the order for costs. In view of the uncertainty as to the jurisdiction of the High Court in the instant case we make no order as to costs in respect of the same.

[34] The ***RSC*** would apply to this case. No transitional provisions were made under the ***Supreme Court (Civil Procedure) Rules, 2008, Part 73*** for the manner in which the costs should be dealt in the circumstances of this case. We therefore order the respondent to pay the appellant's costs in this Court to be agreed or taxed under the ***RSC***, subject to the parties having liberty to make submissions on this order in writing within 14 days of the date of this judgment.

[35] The appeal is therefore allowed. The decision of the Tribunal is reversed. The decision of the High Court is also reversed or set aside as may be appropriate. The respondent is ordered to pay the appellant a severance payment to be calculated in accordance with the provisions of the ***Act*** and interest thereon and costs.

Chief Justice (Acting)

Justice of
Appeal
Justice of Appeal