BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Magisterial Appeal No. 14 of 1997

BETWEEN:

SALIM LEWIS

(Appellant)

AND

COLLIS CHASE

(Respondent)

Before The Honourble Mr. Justice Frederick Waterman, Justice of Appeal, The Honourable Madame Justice Marie MacCormack and The Honourable Mr. Justice Lindsay Worrell, Justices of Appeal (Ag.)

2001: November 6

2002: January 18

Miss Elneth Kentish for the Appellant

Miss Sally Commissiong for the Respondent

DECISION

This appeal turns on the construction of a contract of employment dated July 14, 1992, entered into between the appellant and the respondent. Under the terms of the contract, the respondent accepted conditional temporary employment as a joiner at the home of the appellant in connection with the improvement, renovation, rebuilding and restoration of the said home. The contract provided that a job description [1] of the respondent's duties would be set out in the schedule to the contract. However, no such job description was ever set out in the schedule. There was also provision in the contract that the job description could be amended verbally or in writing with the respondent's approval and he could be asked to perform other professional duties in addition to any duties set out in the job description.

The contract provided for a five-day working week between 7.30 a.m. and 4.30 p.m with the usual lunch break of one hour. There was a mid-morning break of fifteen minutes for which the respondent was paid. The respondent's hourly rate of pay was $8.75 and he would be compensated for any additional work which he did in accordance with the terms of the contract.

The provisions in the contract relating to the termination of employment and resignation are set out in the following clauses:

'EMPLOYMENT UNDERSTANDING TERMINATION TERMS your employment commencement date is July 13, 1992, and you will be employed on an hourly basis from this time forward until such time as the particular task for which you will be employed is completed or until PEH management determines your services are no longer needed at the project. Please note the meaning of the foregoing: PEH management reserves the right to terminate your employment at any given time without prior notice. Your employment may also be terminated summarily if you fail satisfactorily to reach the standards of PEH management with respect to your duties and responsibilities as stated in the attached schedule.

….

If you wish to resign from the Project, please give notice to the Project Manager or his delegated Site Manager. You will be compensated for any work done in accordance with the terms hereinbefore mentioned"

The respondent's commencing weekly wages were $350.00. Shortly thereafter he was given additional duties and his wages were increased to $400.00 per week. By April 1994 his weekly wages were $700.00, having been given more duties in relation to keeping an inventory of stock in the workshop. During the month of March 1995 the respondent was suspended for disobeying the appellant's orders after he was found playing a radio in the workshop. On the respondent's return to work, he and his supervisor and the appellant had a conversation in the course of which

matters relating to his health and the work which he did as a joiner were discussed. It was during these discussions that the respondent told the appellant that he liked [2] joinery and that he would like to do joinery but it might not be in his best interest to do so on a full time basis.

Following these discussions the appellant wrote to the respondent on March 10, 1995 in these terms:

Dear Collis,

I have given thought to you and your health situation. I appreciated our conversation with Emmerson Belgrave, and I hope and believe that he will respond well to your heartfelt apology regarding the use of a radio in the Wood Shop during working hours.

I am pleased that you recall my order on the subject, and I understand that you may not have heard or record that Emmerson issued a similar order. I am glad that you recognize the essential nature of this policy which is intended to reduce distractions and create a safe system of work in the Wood Shop.

In recognition of your health problem and your stated belief that you will be unable to continue to work on a full time basis in the Wood Shop at the required pace I would like to suggest the following proposal: -

1. I will accept your resignation from your present position at this time.

2. To accommodate your health, I am prepared to offer you employment as at your present rate of pay on the basis that you will be free to report to work when your health permits and to remain at home when you are ill or tired and your rate of pay will be adjusted to reflect absences from work for a period which I consider unreasonable I shall be the sole judge of what is reasonable in the circumstances. Alternatively you will be paid by the hour which will be deduced from your present standard of pay on the basis of the number of hours worked. You will be expected to notify the office on any day on which you will be unable to attend work.

In any event I would be prepared to employ you for as long as I can provide work suitable to your present abilities and state of health.

Further I am prepared to assist you in any way with regard to your health and as indicated I will only be involved to the extent that you wish me to be and will not discuss your health problems or any matters relating thereto without your consent.

Kindly let me know whether the proposal is acceptable so that a final agreement can be reached between us as soon as possible.

Yours faithfully,

J.K.

For S.B. Lewis.

There is in evidence claims signed by the respondent for sickness benefits under the National Insurance and Social Security Act, Cap. 47 [3] supported by medical certificates. These relate to the periods 19th to 29th August 1994; 14th to 21st November, 1994; 18th to 28th November, 1994 and 25th November to 5th December, 1994. In each of these claims the respondent states that he is occupied as a joiner.

On receipt of the letter, the respondent sought legal advice and thereafter he declined the offer made by the appellant in the letter of March 10, 1995. The appellant terminated the respondent's services on March 13, 1995 and handed him a termination of Services Certificate under the National Insurance and Social Security Act, Cap. 47, signed by the appellant in which the reason for unemployment states: "terminated - he says he is unable to perform work for which employed due to illness. Declined alternative employment." In this certificate the respondent's occupation is stated as a joiner.

The respondent maintains that, on the date his services were terminated, he was working for approximately $700.00 per week and that he had stopped working on a part-time basis as a joiner. According to him, he was then part of management and he was wrongfully dismissed. The magistrate found that the respondent was elevated to a management position at the time his services were terminated and held that he was wrongfully dismissed. The respondent was awarded damages in the sum of $3500.00 and $350.00 costs.

In giving the reasons for her finding, the magistrate stated:

"On the evidence the court was satisfied that after the plaintiff returned to work from suspension the defendant sought to demote him. The plaintiff was not unable to work but rather did not agree to revert to the position of joiner.

As a general rule the courts have held that if a company constructively dismissed an employee by demoting him, changing his salary or transferring him, his refusal to accept would not constitute cause for discharge. Kunz v. Liggett Drug Ltd. (1981) 36 A.R. 299."[4]

At a later stage in her reasons she further stated:

"The main issue raised was whether the plaintiff could be dismissed "at anytime without prior notice" in accordance with the contract he entered with his employer when he started his employment as a joiner in 1992.

As a general rule, a clearly drafted contract with notice of termination is enforceable. But the facts of this case indicate that the plaintiff circumstances did not remain the same since he started out as a joiner. He was elevated to a management position. In this regard the court accepted the argument of counsel for the plaintiff that he was no longer liable to be dismissed at will under that contract.

On this point the case of Wallace v Toronto Dominion Bank 145 D.L.R. (3rd) 431 Ont. C.A. is instructive. In this case the court upheld a contract providing either party with a four week period of notice as reasonable but made two important qualifications.

One of which was where:

'An employee's level of responsibility and corresponding status has escalated so significantly during his period of employment that it can be concluded that the substratum of an employment contract entered into at the time of his original hiring has disappeared or it can be implied that that contract could not have been intended by the parties to apply to the position in the company ultimately occupied by him'."

The appellant appealed against the decision of the magistrate on the following grounds:

(1) The learned trial magistrate erred in law in holding that the Respondent/defendant was wrongfully dismissed.

(2) The learned trial magistrate erred in law in failing to take into account adequately or at all the fact that the respondent was offered and accepted temporary employment in connection with the renovation and/or rebuilding of the appellant/plaintiff's house as distinct from being employed in a business and that the temporary and conditional nature of the employment did not change.

(3) The decision is against the weight of the evidence before the court.

At the hearing of the appeal, the main contention of counsel for the appellant was that the decision of the magistrate is unsupported by the facts of the case and she submits that the authorities cited by the magistrate in her reasons for decision are inapplicable to the circumstances of the instant [5] appeal. She contends that by virtue of the terms of the contract entered into by the respondent on July 14, 1992 the appellant reserved the right to summarily terminate the respondent's employment and that the appellant was acting in accordance with the terms of the contract when he terminated the respondent's employment.

In our judgment, the evidence shows that sometime after the respondent commenced duties as a joiner he was given additional duties and his weekly wages were increased accordingly. Under the terms of the contract which he entered into on July 14, 1992 provision is made for the respondent performing additional duties and being compensated for such duties. The crucial question to be decided is what was the respondent's status at the date of termination of his employment. There is no better evidence than what is contained in the respondent's claims for sickness benefits all of which are signed by him and which cover the period 14th August, 1994 to 5th December, 1994, three months before his services were terminated. In each of these claims he states that he is employed as a joiner, despite what he said to the Magistrate that he was then part of management. Apparently this evidence was overlooked by the magistrate. In our view the respondent started out as a joiner and remained as such throughout the period of his engagement, except that he was given additional duties for which he was compensated in accordance with the terms of the contract.

In our view, when the appellant terminated the employment of the respondent he was acting within the terms of the contract. It is in this regard that the decision in the case of Kunz v. Liggett Drug Ltd et al has no application to the circumstances of the instant appeal, since in that case the employer made a unilateral and substantial change in the terms of the employment of the employee and repudiated the contract of employment and [6] having dismissed the employee because of her refusal to accept demotion, the court held that the employee was wrongfully dismissed.

With regard to the passage cited by the magistrate in her reasons from the case of Wallace v Toronto-Dominion Bank (1983) 145 D.L.R. (3rd), 431. This passage, taken from the judgment of Robins J.A., related to questions raised in that case as to fairness and conscionability of a contract entered into by a bank employee whom the judge at first instance held was demoted in circumstances found to amount to constructive dismissal. This observation by Robins J.A., related to the bank employee's complaint that having worked for the bank for a period of eight years he ought in fairness be entitled to a longer period of notice than the four weeks stated in his contract. In this case the court held that the contract was binding and that the bank employee was bound by the plain words in the contract to which he had given his assent. The observation by Robins J.A., does not apply to the circumstances of the instant appeal. We are of the view that it is immaterial whether the effect of the letter of March 10, 1995 was to demote the respondent or not.

For the reasons given above we would allow the appeal. The decision of the magistrate is set aside. Judgment is ordered for the appellant: costs awarded to the appellant. [7]

Justice of Appeal

Justice of Appeal (Ag.) Justice of Appeal (Ag.)