

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Magisterial Appeals Nos. 8, 9 & 10 of 2014

BETWEEN:

SANDY LANE HOTEL CO. LIMITED Appellant

AND

JULIANNA CATO First Respondent

WAYNE JOHNSON Second Respondent

CHARMAINE POYER Third Respondent

**Before: The Hon. Andrew D. Burgess, The Hon. Kaye C. Goodridge,
Justices of Appeal and The Hon. Margaret A. Reifer, Justice of Appeal
(Acting)**

2018: October 9, November 29

2019: May 7

Mr. Satcha Kisson for the Appellant

Mr. Edmund King QC and Ms. Nailah Robinson for the Respondents

DECISION

GOODRIDGE JA:

INTRODUCTION

[1] This is an appeal against the decision of Magistrate Barbara Cooke-Alleyne, as she then was, sitting in the magistrate's court for District "E" Holetown, in which she found that the respondents had been wrongfully dismissed by the appellant Sandy Lane Hotel Co. Limited.

FACTUAL BACKGROUND

- [2] The respondents were employed by the appellant by way of separate letters of employment. The first respondent, Ms. Julianna Cato, was employed as a reservationist with effect from 20 November 2000. The second respondent, Mr. Wayne Johnson, was employed as a bartender from 11 June 2008. The third respondent, Ms. Charmaine Poyer, was employed as an assistant waitress from 20 November 2000.
- [3] On 30 January 2012, the respondents were dismissed from their employment when they were given letters of termination by the appellant. Each letter stated that one-week's notice was being given in accordance with the contract of employment which would expire on 9 February 2012, and that the respondent was not required to report for work during that week. Each respondent also received three cheques, one for accrued vacation, one for the payment for the week ending 4 February 2012 and one representing one week's payment in lieu of notice.
- [4] Prior to receipt of the letters of termination, the respondents were individually summoned to a meeting with the Human Resource Manager and informed that they had failed to provide adequate service to a "mystery shopper."
- [5] The letters of termination stated that the first and second respondents' actions had resulted in the decline of the appellant's rating in the Richley Report from 65 points in 2010 to 48 points in 2011 in the Monkey Bar and

the Beach Bar respectively. The third respondent was informed in her letter of termination that her handling of a guest who had called prior to their visit on 1 December 2011 "materially contributed to the overall decline rating and position as one of the Leading Hotels of the World."

[6] The respondents all denied these allegations.

THE PROCEEDINGS IN THE MAGISTRATE'S COURT

[7] On 16 November 2012, the respondents each filed a plaint and statement of claim in the magistrate's court for damages for breach of the employment contract between them and the appellant. The respondents alleged that it was an express term in their contract of employment that the appellant would not dismiss them except for just cause and would in such a case follow the procedures set out in the agreement.

[8] The matters were heard as one by the magistrate. The respondents each gave evidence and called one witness, Mr. Levere Richards (Mr. Richards) of the Barbados Workers Union (BWU).

[9] Mrs. Winifred Williams (Mrs. Williams), Manager, Human Resource Operations, gave evidence on behalf of the appellant.

[10] The respondents testified that they had each signed the contract of employment signifying acceptance of its terms. Under cross-examination, the respondents agreed that their contracts (i) incorporated the Sandy Lane Rules of the Game staff handbook and (ii) provided for termination of employment by the giving of notice of one week.

[11] Mr. Richards' evidence was that there was a memorandum of agreement between the Barbados Hotel and Tourism Association (BHTA) and the BWU (the Collective Agreement). He stated that the appellant was party to this agreement by virtue of its membership in the BHTA. Under cross-examination, Mr. Richards accepted that, while the respondents were all members of the BWU, they were not themselves signatories to the Collective Agreement.

[12] Mrs. Williams testified that on 31 January 2012, she met with the 3 respondents separately for the purpose of terminating their contracts of employment. She stated that their dismissals were in accordance with the termination clause in their contracts of employment. Under cross-examination, Mrs. Williams testified that the respondents were dismissed for breach of contract. She stated that she was faced with a situation, looked at the contract and used the best option available to her.

[13] At the conclusion of the hearing, the magistrate found that the respondents were wrongfully dismissed and granted them damages in the sums claimed.

THE MAGISTRATE'S REASONS FOR DECISION

[14] In her reasons dated 20 January 2017, the magistrate stated that, having examined the relevant documents and based on the evidence given in court, she had come to the following conclusion:

"The letters of employment do not refer to the notice in lieu. The Plaintiffs on being asked said that the Rules of the Game were part of their contract. This determination is for the Court.

The letters of employment explicitly incorporate the Barbados Workers Union as part of the contract. The said letter refers to the Rules of the Game being issued on your first day.

Unlike the Barbados Workers Union the mention of the Rules of the Game does not explicitly incorporate it into the contract. As such the court does not hold that it is part of the contract of employment.

Accordingly it was not lawful to terminate the employees by purporting to give notice in lieu."

THE APPEAL

[15] The appellant filed three notices of appeal against the magistrate's decision.

By order of this Court made on 2 May 2017, the appeals were consolidated.

Grounds of Appeal

[16] The appellant has challenged the magistrate's decision on five grounds.

These are:

"a. The Learned Magistrate erred in law and her finding of fact by holding that the Respondent/Plaintiff were wrongfully dismissed by the Appellant/Defendant, in circumstances where the Appellant/Defendant had terminated the contract of employment in accordance with the express terms of the written contract and the Appellant/Defendant had given the Respondent/Plaintiff the requisite payment in lieu of notice.

b. The Learned Magistrate erred in law and in her finding of fact that the Sandy Lane Champion Rules of the Game did not form a part of the contract of employment between the Appellant/Defendant and the Respondent/Plaintiff;

c. The Learned Magistrate's decision was against the weight of evidence in that the Learned Magistrate failed to give sufficient

weight to the evidence of [the Respondents] where in [their] evidence [they] state and accept:

- a. That the Champion Rules of the Game formed part of [their] contract of employment.
- b. That the contract of employment provided for termination by the giving of a period of notice.
- d. The Learned Magistrate erred in Law and her finding of fact that the Barbados Workers Union agreement made between the Barbados Workers Union and the Barbados Hotel & Tourism Association operated to alter the terms of the contract between the Appellant/Defendant and the Respondent/Plaintiff with respect to the agreed period of notice to be given by either party on termination.
- e. The Learned Magistrate erred in law and her finding of fact by holding that the Appellant/Defendant was liable to pay damages to the Respondent/ Plaintiff for wrongful dismissal."

THE ISSUE

[17] The issue for our determination is whether the magistrate was correct in finding that the respondents had been wrongfully dismissed.

[18] Before discussing this issue, however, it is important to observe that it is common ground between the parties that the events which gave rise to this appeal took place on 31 January 2012, prior to the commencement of the **Employment Rights Act, 2012-9**. Consequently, the provisions of that Act do not apply in this case.

DISCUSSION

[19] We consider it useful before beginning our discussion to set out the terms and conditions governing the relationship between the parties as contained in the contracts of employment.

The Contract of Employment

[20] By way of example, we take the contract of employment for the second respondent, which provides as follows:

"Congratulations Wayne! We are pleased to confirm that effective September 26 2008 your status have (sic) changed from part-time to full-time Bartender in the Food & Beverage Department at the Sandy Lane Hotel Co. Ltd.

Your years of continuous services (sic) shall be deemed to have commenced on October 21, 2005.

- **Remuneration:**

Wages are in keeping with the agreed rates between the Barbados Workers' Union and Sandy Lane Hotel. Wages and salaries, which do not form part of the collective bargaining unit, are reviewed annually.

- **Working Hours:**

Normal hours of work shall be forty (40) hours per week over five days but may be reduced according to the exigencies of the business. You will be guaranteed a minimum of twenty-four (24) hours spread over five days and you will be required to work shifts including split shifts.

- **Meals**

We will provide you with one meal per shift for each day that you work, one half hour (30) minutes meal break per tour of duty.

- **Uniforms**

Your SL gear is provided by the company and laundered at the company's expense.

- **Annual Leave**

Annual holiday will be in accordance with the Holidays with Pay Act.

- **Medical/Accident**

You will be required to join Sandy Lane's medical plan, which is a contributory medical plan.

.....

- **Internal Procedures, Rules and Discipline**

The company requires an exemplary standard of discipline from you, together with satisfactory standards of work. Dismissal will take place if your standard of work or conduct falls. The Champion Rules of the Game is issued to you on your first day of work.

- **Termination of Employment**

Except where summary dismissal is justified should you be found guilty of misconduct or dishonesty at work, the period of notice required to be given by either party is one (1) week.

- **Conditions**

The terms of this agreement are in accordance with the existing Barbados Workers Union contract."

[21] In the Champion Rules of the Game, the Disciplinary Code is found at pages 95 to 103. The first paragraph on page 95 provides:

"The Company requires a good standard of discipline from you, together with satisfactory standards of work. Code of Discipline rules apply to all employees of the Company. You will be dismissed if your standard of work or conduct falls and, after warning, remains below the level, which is acceptable."

Thereafter, set out at pages 96 to 103 is a list of offences along with the penalties which may be imposed.

- [22] The Disciplinary Procedure as per the Collective Agreement is set out at pages 104 to 106. It is noted that at paragraph (5) on page 104, any disciplinary action which is taken without following the procedure shall be set aside.
- [23] The Grievance Procedure as per the Collective Agreement is found at pages 107 to 108.
- [24] At page 108 in the Champion Rules of the Game is the termination of service provision. This is similar to the provision set out in the contract of employment, with the added statement that "the Company reserves the right to pay wages/salary in lieu of notice. The right to all or part of the notice period may be waived by mutual consent."
- [25] This leads us to a consideration of what was the contractual intention of the parties in this case.
- [26] It was the submission of Mr. Satcha Kissoon, counsel for the appellant, that the notice provision in the contract permitted the appellant to terminate the respondents' employment, provided the notice was that which pertained in the contract. Relying on the cases of **Delaney v Staples [1992] 1All ER 944** and **Caribbean Commercial Bank Ltd v Ingrid Daniel, Magisterial Appeal No. 8 of 1997**, he argued that once there was a provision in the contract of employment which the parties had had an opportunity to agree with respect to notice and that mechanism was triggered, the dismissal was

lawful, provided the appropriate notice was given or payment in lieu of notice.

[27] However, Mr. Edmund King, QC, counsel for the respondents, contended that the contracts incorporated by reference under the rubric: "Internal Procedure Rules and Discipline" the Champion Rules of the Game and, under the rubric: "Conditions", the existing BWU agreement. Therefore, counsel submitted, it was an express term of the respondents' contracts of employment that the appellant would not dismiss them except for just cause and in such a case, the appellant would follow and observe the procedures set out in the agreements.

[28] In **E Phil & Sons Ltd v A/S (Denmark) v Brondum A/S (Denmark), Civil Appeal No. 24 of 2012, (E. Phil)**, this Court decided that the principles enunciated by Lord Hoffman in the English House of Lords case of **Investors Compensation Scheme Ltd v Bromwich Building Society [1998] 1 WLR at 912-913 (Investors Compensation Scheme)** are the principles which should guide our courts in any inquiry into the meaning of contractual language. Indeed, the Caribbean Court of Justice has accepted and applied these principles in the case of **Sea Haven v Dyrud (2011) 79 WIR at 146 para [30]** and cited them with approval in **Campbell v A-G of Barbados (2009) 76 WIR 63**.

[29] These principles were succinctly captured by Lord Steyn in the English House of Lords case of **Sirius International Insurance Co. (Publ) v FM General Insurance Ltd [2005] 1 All ER 191** where he said at **p 200**:

"The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person circumstanced as the actual parties were, would have understood the parties to have meant by the use of the specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual scene."

[30] In **E. Phil**, this Court stated at **para [53]**:

"The bedrock of the Investors Compensation Scheme contextual approach to commercial contract interpretation is the objective theory of contractual interpretation. According to this theory, the purpose of the interpretation of a contract is not to discover how the parties understood the language of the text, which they adopted. Rather, the aim is to determine the meaning of the contract against its objective contextual scene. Lord Hoffman explained this theory in *Chartbrook* at p 1120 para [39] as follows:

"English law....mixes up the ascertainment of intention with the rules of law by depersonalising the contracting parties and asking, not what their intentions actually were, but what a reasonable observer would have taken them to be".

[31] The first question which we must now ask ourselves is what would a reasonable person circumstanced as the appellant and the respondents were in this case have understood the parties to mean, that is, whether by the express reference to the Champion Rules of the Game and the existing

BWU Collective Agreement it was intended that these documents be part of the contract of employment.

[32] In our opinion, by their very nature and language, the provisions in the Champion Rules of the Game are contractual terms, and were incorporated into the contract of employment by the express reference to those Rules under the provision “Internal Procedures, Rules and Discipline”. The Champion Rules of the Game set out in detail the Disciplinary Code, the expected standards of behaviour and the penalties or consequences for any breaches of those standards, including that of dismissal. These were all important provisions within the context of the contract of employment.

[33] As for the BWU Collective Agreement, this document was also incorporated by reference into the contracts of employment.

[34] We therefore conclude that the magistrate erred when she found that the Champion Rules of the Game did not form part of the contract of employment.

[35] The second question which we must answer is whether the appellant was entitled, as it has maintained, to terminate the respondents by invoking a single clause in the contract notwithstanding the express provisions in the Disciplinary Code.

[36] In the letters of dismissal which were issued to the respondents, the appellant set out its complaint regarding their standard of work and stated that their deficiencies contributed to the decline of the appellant’s rating in

the Richey Report and ultimately affected the appellant's overall rating and position as one of the leading hotels in the world.

[37] According to the evidence of Mrs. Williams in cross-examination, she looked at the contract and the Champion Rules of the Game before terminating the respondents. She admitted that "it was a disciplinary procedure" and further stated that the respondents were dismissed for breach of contract and not for a breach of discipline. In re-examination, Mrs. Williams stated that the Disciplinary Code was irrelevant to the process.

[38] We are of the opinion that the termination clause relied on by the appellant cannot be viewed in isolation and must be examined within the totality of the contractual provisions. The clause must therefore be read subject to the Champion Rules of the Game and the detailed procedure for the treatment of matters of discipline. The result is that a fetter was imposed on the appellant's right to terminate the respondents.

[39] The contract of employment gave the appellant the right to summarily dismiss an employee found guilty of misconduct or dishonesty at work. Where summary dismissal was not warranted, the disciplinary procedure ought to be followed.

[40] The reason for the respondents' dismissal was unsatisfactory performance. We consider that the appellant was obligated under the terms of the employment contract to invoke the stated disciplinary procedure to deal

with the alleged issues of poor standard of work. Having failed to do so, the appellant acted in breach of the terms of the employment contract when it dismissed the respondents.

[41] We conclude that, despite her finding that the Champion Rules of the Game were not part of the contract of employment, the magistrate's finding that the respondents were wrongfully dismissed and that they were entitled to damages was correct. In the circumstances, the appeal should be dismissed.

[42] One final matter. In ruling in favour of the respondents, the magistrate granted damages in the sums claimed. However, the amount of damages was not assessed as required by **section 45 (1) of the Severance Payments Act, Cap. 355A.**

DISPOSAL

[43] It is ordered as follows:

1. The appeal is dismissed.
2. The appellant shall pay the respondents' costs of the appeal to be assessed if not agreed.
3. The parties shall calculate the amount of damages to be paid to each respondent no later than 17 May 2019.
4. The appellant shall pay the agreed damages on or before 14 June 2019.

5. In the event that the parties are unable to agree such damages, they are at liberty to apply to this Court for assessment of the same.

Justice of Appeal

Justice of Appeal

Justice of Appeal (Acting)