[2011] JMCA Civ 3

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CIVIL APPEAL NO 27/2009

BEFORE: THE HON. MR JUSTICE PANTON, P
THE HON. MRS JUSTICE HARRIS, J A
THE HON. MR JUSTICE MORRISON, J A

BETWEEN	**CECIL JULY**	**APPELLANT**
AND	**KIRK HALL**	**RESPONDENT**

Miss Kadia Wilson and Miss Tamara Greene instructed by Taylor Deacon & James for the appellant

Miss Audrey Clarke instructed by Judith M Clarke & Co for the respondent

6, 20 December 2010 and 28 January 2011

PANTON, P

[1] On 20 December 2010, we dismissed the appeal herein, but reduced the sum that had been awarded by the Resident Magistrate to $142,450.00. We also awarded costs of $15,000.00 to the respondent. We now give our reasons for our decision.

[2] The appellant is an attorney-at-law who practises in Black River, St Elizabeth, while the respondent is a labourer. The latter was employed to the former from 1989 until his dismissal in 2008. In the suit filed by the respondent, he claimed that the

appellant had failed to pay him the sums due to him for vacation leave that had not been taken. The Resident Magistrate accepted the respondent's claim and awarded him the sum of $152,000.00. This appeal was in respect of that award.

[3] The claim was for $152,000.00 for vacation leave pay. At the commencement of the proceedings before the learned Resident Magistrate, the defence was recorded thus:

> "1. The Action is Statute-barred.
>
> 2. The Plaintiff is not entitled to accumulate vacation leave. See Section 4(c) of the Holiday with Pay Act.
>
> 3. The Plaintiff did not commence work as a casual worker in 1989. He commenced working as a casual worker in/around the year 2000. Prior to 2000 he was a contract worker.
>
> 4. The Defendant denies owing money for vacation leave. The Plaintiff took his vacation leave each year it became due."

[4] The respondent and his brother Devon Hall gave evidence in support of the claim. However, the appellant spake nary a word. He elected to make submissions instead through his attorney-at-law. The submissions were in respect of the defence stated earlier. These submissions were repeated before us, they having been rejected by the learned Resident Magistrate.

[5] The evidence presented by the respondent indicated that he was employed by the appellant from 15 May 1989 as a cowhand. He was not allowed to take vacation

leave throughout the period of his employment as, whenever the subject was broached with the appellant, his response was that "cow don't get holidays". That response suggested, in its most favourable sense, that the appellant was saying that the respondent could not go off on vacation as the cows were not going to be on vacation and had to be tended. It also meant that the appellant had no intention of employing someone in place of the respondent while he was on vacation.

[6] The starting wage for the respondent was $1,150.00 per week, and this was increased by $150.00 each year until the respondent was dismissed during the first week of January 2008. This means that at the time of his dismissal, he was being paid $3,850.00 per week.

[7] The trial of the suit took place on 27 May, 29 July and 30 September 2009. On 30 October 2009, the learned Resident Magistrate rejected the submissions that were made on behalf of the appellant and, having considered the unchallenged evidence of the respondent and his witness, expressed the view that they spoke truthfully. She found that the respondent was not a contract worker, and was entitled to vacation leave each year. This vacation leave was not taken, nor was he paid for same. Consequent on these findings, she gave judgment in favour of the respondent "in the sum $152,000.00 claimed for vacation leave from 1989 to 2007, plus $4,000.00 for one week's pay (January 7-11, 2008) and costs to be agreed or taxed".

[8] The learned Resident Magistrate described the respondent as "simple". That is a description which may also be attached to the case itself. Notwithstanding the

apparent simplicity, the appellant managed to file as many as seven grounds of appeal. At the hearing, four of these grounds were quite properly abandoned. Those that remained and were argued were grounds one, three and five which are set out seriatim:

- "The verdict is unreasonable and cannot be supported by the evidence."

- "The judge erred in finding that the action brought by the plaintiff/respondent was not statute barred, the plaintiff/respondent having brought an action for vacation leave payment for the years 1989 in the year 2008, being much more than six (6) years since the cause of action first arose."

- "By *section 4(1)(c) of the Holiday With* Pay *Order, 1973,* Subsidiary Legislation, vacation leave can only be accumulated for three (3) consecutive years if there is provision for accumulation in an agreement between the employer and the employee. Yet the judge in her judgment found that vacation leave could be accumulated for nineteen (19) years from 1989 to 2008."

[9] In respect of ground one, Miss Kadia Wilson, for the appellant, submitted that there was no evidence as to how the learned Resident Magistrate had arrived at the figures in her judgment, that is, the sum of $152,000.00 plus $4,000.00. Initially, Miss Wilson said that on the basis of the viva voce evidence given by the respondent, the most that he would have been earning would have been $1,850.00 per week. She later revised this sum upwards to $3,350.00, while challenging the figure of $4,000.00 per week which was used by the learned Resident Magistrate in doing her computation of

what was due to the respondent. Further, Miss Wilson said that there had been no claim by the respondent for loss of wages for the period 7-11 January, 2008, yet the Resident Magistrate had made an award in that respect. She also complained that the record of appeal contained a spreadsheet prepared by the Ministry of Labour as regards the amount due to the respondent, although that document did not form part of the proceedings below. In the circumstances, submitted Miss Wilson, there was no evidence to justify the award that the learned Resident Magistrate had made.

[10] Miss Audrey Clarke, for the respondent, submitted, in response, that the award made by the Resident Magistrate for the period 7-11 January 2008 was justified although it was not a part of the claim. According to Miss Clarke, the award was evidently made in the interests of justice as there had been nothing more than a technical error in the pleadings. The sum, she said, was due in law. We cannot agree with Miss Clarke that the learned Resident Magistrate acted correctly in this regard. The claim by the respondent was quite specific; for an additional sum to be awarded in the judgment, there ought to have been an application to amend the claim. This not having been done, the learned Resident Magistrate was in error in awarding the amount.

[11] As regards the complaint of lack of evidence to support the claim in respect of vacation leave pay, we agree with Miss Clarke that there was ample evidence of the earnings of the respondent. This evidence was in the form of the oral evidence given by the respondent. The submission of Miss Wilson in this regard is therefore misconceived.

Limitation of actions

[12] Grounds three and five may be considered together. They relate to the accumulation of the vacation leave, and whether there is a restriction on the length of time for such accumulation. This would determine the amount to which the respondent was entitled. Miss Wilson submitted that a claim for vacation leave pay arises legally after one has been employed for a year. Time, she said, begins to run whenever the leave becomes due and is not taken. Each year's leave, she said, gives rise to a separate cause of action. In the instant case, according to Miss Wilson, the respondent took no leave and so is taken to have surrendered his right to action after a period of six years has elapsed from the date on which the leave became due. By her calculation therefore, the respondent would have been entitled to no more than such sum as would have become due since 2002, given the fact that the suit was filed in June 2008. This submission is a clear concession that the respondent was indeed entitled to some vacation leave pay; and no argument has been advanced to derogate from that entitlement.

[13] Miss Wilson prayed in aid paragraph 4(1) (c) of the Holidays With Pay Order 1973, while contending that there could not be accumulation for more than three years. The Order was made under section 3 of the Holidays With Pay Act, which provides that the Minister may by order direct that workers in any occupation shall be entitled to be allowed such holidays with pay as may be determined. It is appropriate to set out paragraphs 3 and 4 of the Order. They read thus:

"3. - (1) Any worker, other than a casual worker, who works for any employer on not less than 110 days in any qualifying year shall be granted a holiday with pay by that employer in respect of that qualifying year.

(2) The duration of such holiday with pay shall be determined in accordance with the Schedule.

4. - (1) The holiday with pay which any worker has earned in any qualifying year under paragraph 3 -

(a) shall be granted by his employer during the next succeeding qualifying year; or

(b) may, by agreement between him and his employer, be granted during that qualifying year; or

(c) may be carried forward and added to any holiday with pay which he may earn in the first two succeeding qualifying years if there is provision for accumulation of holiday with pay for not more than three consecutive years in an agreement subsisting between him, or a trade union representing him and his employer or an organization representing his employer."

The Schedule makes provisions for the length of the holiday, depending on the period of service. Miss Wilson submitted that paragraph 4 is to be interpreted to mean that there can be no accumulation of vacation leave pay for more than three years. However, we did not see any merit in that submission as the paragraph does not make

any prohibition of that nature. In a contractual situation, parties are at liberty to make any arrangements they wish provided it is not contrary to law or against public policy. In the instant situation, the appellant as employer had indicated to the respondent that

cows did not go on holiday. This meant that he was not prepared to permit the respondent to take the leave due to him at the time it was due as the cows had to be tended, they not being on holiday. It ought not to be imagined that the appellant would thereby have intended to deprive the respondent of the consequential right to being paid for the holiday not taken. In the absence of any legal prohibition or of any agreement to the contrary, we found that the parties were in agreement that the holiday was not to be taken and the respondent would be compensated for the holiday not taken.

[14] In any event, paragraph 7 of the Order puts the matter beyond doubt. It reads thus:

> "7. - (1) Upon termination of the employment of any worker his employer shall -
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> (a) where that worker earned any holiday with pay which was not granted before such termination, pay him a sum equal to the holiday remuneration which would have been payable to him if all such holiday were then being granted; or
>
> (b) pay him any gratuity which he earned and did not receive before such termination."

Miss Clarke, for the respondent, submitted that this paragraph was aimed at preserving "justice for the person who does not hold the handle". It is quite clear that there is no limitation placed in the paragraph on the period for which the worker may be paid at the time of termination. What is required, in keeping with the Order, is for the employer to pay to the worker upon termination a sum of money equal to the holiday remuneration earned but not granted as if all the holiday were then being granted.

[15] In what appears to be a reinforcement of the entitlement set out in paragraph 7 of the Order, section 7 of the enabling Holidays With Pay Act states:

> "Any provision in an agreement between any employer and a worker whereby the worker purports to contract himself out of the provisions of any order made under this Act, or whereby the worker undertakes to receive any less benefit than he is entitled to under any such order, shall have no effect."

So, even if the respondent had wished to enter into an arrangement with the appellant to waive his right to the sum to which he was entitled upon the termination of his services, the statute would not permit it. Grounds three and five were therefore without any merit.

[16] In the circumstances, at $3,850.00 per week, the respondent was entitled to $7,700.00 representing two weeks wages for each completed year of employment starting from 15 June 1990 up to 15 June 2007, and one week's wages for the period 15 June 2007 to January 2008 when his services were terminated. This makes a total of

$142,450.00. He made no claim in respect of the week of dismissal; hence no award can be properly made.

[17] It is for the foregoing reasons that we dismissed the appeal while slightly reducing the sum awarded. As stated earlier, the respondent is to have costs of $15,000.00. This sum for costs is as prescribed in section 261 of the Judicature (Resident Magistrates) Act.