

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CIVIL APPEAL NO COA2021PCCV00017

**BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE D FRASER JA
THE HON MISS JUSTICE SIMMONS JA**

BETWEEN	DAVID COUSINS	APPELLANT
AND	ABRAHAM FERGUSON	RESPONDENT

Appellant in person

Respondent in person

17 February and 2 March 2023

STRAW JA

[1] I have read, in draft, the judgment of my learned brother, D Fraser JA, and agree with his reasoning and conclusion. I have nothing to add.

D FRASER JA

Introduction

[2] This is an appeal by the appellant David Cousins against the decision of Her Honour Mrs Mitsy Beaumont-Daley (the learned judge of the Parish Court ('LJPC')), made on 16 April 2018, whereby she entered judgment for the respondent in the suit brought by the appellant against the respondent Abraham Ferguson. By plaint note filed in the Parish Court for the Corporate Area holden at Sutton Street on 30 October 2017, the appellant alleged that the respondent, to whom he had been employed at a salary of \$8,000.00 per week, terminated his services without notice and also failed to pay him his salary for

two weeks. He claimed in the plaint the combined sum of \$32,000.00 for the two weeks outstanding salary and "notice pay" of two weeks.

The proceedings in the Parish Court

The evidence of the appellant

[3] Both the appellant and respondent were self-represented in the court below as they were before this court. In his evidence, the appellant indicated that he worked for the respondent at his woodwork shop at 1 – 11 Pechon Street for two years and he left in October 2017. He indicated that while working at the shop, he had to leave for a family emergency and when he returned the following day and informed the respondent why he had to leave, the respondent became belligerent and refused to assign him duties. He indicated that, on the advice of the Ministry of Labour he continued to report to work. However, for those two consecutive weeks he was not assigned any duties.

[4] The appellant stated that he made further contact with the Ministry, on whose advice he wrote a letter to the respondent concerning his employment status. Having received no response from the respondent, he again contacted the Ministry of Labour which convened a meeting between both parties. At that meeting, Ms Foster, the labour officer, instructed the respondent that the appellant was due vacation pay for two years. He indicated that the respondent agreed to make that payment on condition that he removed his tools and unfinished jobs from the respondent's workshop. The appellant confirmed that he removed his tools and received payment in the sum of \$32,000.00.

[5] However, he noted that Ms Foster did not address the "Notice Pay matter". The appellant testified that, "He fired me in the labour office. That is when I knew that he did fire me". Despite that assertion, later in his evidence in chief, he also testified that, "The Ministry of Labour has no idea when I was fired, laid off or being redundant and was therefore not in a position to address the notice pay".

[6] At the end of his evidence in chief, he had claimed two weeks' salary for when he reported to work and was not assigned duties and notice pay of four weeks "for being terminated wrongfully and unfairly".

The evidence of the respondent

[7] The respondent confirmed that the appellant worked for him for two years up to late October 2017 for \$8,000.00 per week. He noted that nothing was in writing and it was a verbal agreement. He complained that the appellant took on other assignments and solicited jobs in his establishment, without his consent. He asserted that he had been making complaints to the appellant on a daily and weekly basis concerning those unapproved activities the appellant was carrying out at his shop. He indicated that he did not accept the appellant's explanation that he had to leave because of a family emergency and asserted that the appellant had done so to take care of a job that he had taken on privately.

[8] The respondent outlined that when he arrived on location and saw that the table he had instructed the appellant to work on was untouched, he tried to reach him by telephone. When he did not get him, he left a message that, "he was to stay where he is and make himself very comfortable". The respondent indicated that the appellant had not done any work for him since then. This latter statement qualified his earlier evidence that the appellant worked for him until late October 2017, especially when considered with exhibit b, which will be reviewed later.

[9] The respondent maintained that when the appellant took him to the Ministry of Labour and said he was to receive compensation, "he did not do any work since that date in October and in light of the activities that he had been carrying out, effectively he has terminated himself by carrying out his own business on my time and expect me to pay him". The respondent further stated that, "[h]e showed up for work and worked on the items he had in the shop", but that "he never gave him permission to conduct his own business there." The respondent also indicated that the appellant asked him at the end of the session at the Ministry of Labour about notice pay, but he could not recall any

request then for two weeks' salary. He outlined that the opinion of the labour officer was that the appellant was entitled to vacation leave pay but not notice pay.

[10] In cross-examination, he maintained that the message he left on the appellant's phone, which the appellant had recorded was "stay where you are and make yourself comfortable because you can't have one foot in and one foot out". He also stated that occurred before the appellant went to the Ministry of Labour.

The judgment of the learned Judge of the Parish Court

[11] At the end of the notes of evidence it is indicated that judgment was entered for the respondent. This court has been advised that no reasons for judgment have been produced in this matter.

The appeal

[12] The complaints against the decision of the LJPC which can be gleaned from the notice and grounds of appeal filed by the appellant may be summarised as follows:

- a) The judgment of the LJPC was in conflict with the Labour Law of 1974.
- b) The appellant was deprived of the right to a fair and impartial trial as he was unable to:
 - i) lodge meaningful objections; and
 - ii) submit material to support his case at trial (exhibits a, b and d were prevented from being introduced into evidence).

[13] Accordingly, the appellant sought an order: a) overturning the decision of the LJPC; b) granting the appellant monetary compensation of four weeks' notice pay; and c) interest for three years.

The submissions

The appellant

[14] The appellant submitted that his termination was malicious and wrongful under the labour law. He further argued that he did not receive a fair and impartial trial as:

- a) he was denied the opportunity to present the following physical evidence as exhibits: i) a copy of the labour law showing the requirements under the law; ii) a letter he had written and furnished to the respondent asking him to explain the status of his employment; and iii) a video recording he had made that the LJPC did not want to hear; and
- b) The respondent was lying on the stand and the LJPC did not allow the appellant to challenge him.

The respondent

[15] The respondent submitted that the LJPC indicated that she did not find the appellant credible. He also stated that based on the appellant's actions, he determined that the appellant had abandoned his job.

Discussion and analysis

[16] It is probably best to first address the procedural complaints of the appellant, that he was not allowed to object to particular bits of evidence, or to introduce certain exhibits into evidence. As was explained to him while he was making his oral submissions, during the trial process each party is given a chance in turn to give their evidence, which is then subject to cross-examination. The record reveals that the appellant cross-examined the respondent concerning all the key aspects of dispute in this matter including: whether he genuinely had a family emergency; why he did not bring any witnesses; the place and date the appellant's employment was terminated; and particular phone recordings. There is, therefore, every indication that the appellant was given the opportunity to and did challenge the aspects of the respondent's evidence with which he disagreed. The trial

process, however, does not allow the use of objections to prevent a witness from giving particular evidence, merely because the other side does not accept that evidence is true.

[17] The complaint alleging the suppression of exhibits can also be quickly answered. There is no need for laws of Jamaica to be received into evidence as the court should, as a matter of course, have regard to any applicable law that governs the relevant issues to be decided in the case being tried. The LJPC would, therefore, have been duty bound to consider all the appropriate sources of law, including the Employment (Termination and Redundancy Payments) Act ('E(TRP)A'), to determine if the appellant was entitled to payment in lieu of notice and, if so, how much.

[18] Contrary to the complaint of the appellant, a copy of his letter dated 7 October 2017 to the respondent was actually received in evidence as exhibit b. That letter explained that on 2 October 2017, the appellant had to leave work because of a family emergency. It also confirmed that it was on that date the respondent left a message on the appellant's phone saying that "[he] should stay where [he] was". It further confirmed that the appellant had not been assigned work since that day. It ended with the appellant querying whether he had been terminated. That letter and its contents was therefore squarely before the LJPC for consideration.

[19] In respect of the complaint that the LJPC declined to admit a subsequent video recording into evidence, while we do not have the benefit of the reasons for judgment, we observe that, assuming without deciding that such a video existed, from the submissions of the appellant, it came into existence after the events of 2 October 2017. After that date, both parties agree (though for different reasons) that the appellant did no further work for the respondent. It is unlikely, therefore, that the contents of such a video would have any legal bearing on the effect of the events of 2 October 2017 relevant to the appellant's employment status. On the above analysis, the court does not find that the trial process was in any way unfair or partial, or that the appellant suffered any prejudice due to the LJPC's refusal to admit the video.

[20] I now turn to the substantive issue of the appellant's entitlement, if any, to salary or notice pay. The resolution of the substantive issue is founded on facts that the LJPC had to resolve. The long-settled governing principle is that an appellate court will not lightly disturb a trial judge's findings of fact, unless it is satisfied that the judge is plainly wrong: **Garnett Dennis v Newton Barnes and anor** [2021] JMCA App 21 following **Watt (or Thomas) v Thomas** [1947] AC 484 and other cases.

[21] The appellant has meandered from one position to another concerning what he is claiming. On the plaint, his claim was for two weeks' salary and two weeks' notice pay. In his evidence before the LJPC, he indicated he was claiming two weeks' salary and four weeks' notice pay. Before this court he sought to justify the claim of four weeks' notice pay on the basis that he had worked for the respondent for more than five years. He later however indicated that period was not continuous. It was the appellant in his evidence, who first stated that he worked at the respondent's shop for two years and that he left in October 2017. The respondent agreed with that timeline in his evidence.

[22] Given the claim and the evidence that emerged at trial, what the LJPC had to decide as questions of fact were, when the employment of the appellant ended and by what means. Section 3(1)(a) of the E(TRP)A stipulates that when the contract of an employee who has been continuously employed for more than four weeks but less than five years is being terminated, that employee is entitled to two weeks' notice. Naturally, if notice is not given as stipulated, the employer would then have to pay two weeks' salary in lieu of notice: **Edward Gabbidon v Sagicor Bank Jamaica Limited (Formerly RBTT Jamaica Limited)** [2020] JMCA Civ 9 at para. [128].

[23] The E(TRP)A has, however, not abrogated the common law concerning the effect of abandonment of employment or where summary dismissal is justified. Neither notice nor payment in lieu of notice is required if the employee either abandons the job or the contract is justifiably terminated for cause by summary dismissal. If that were not the case the employee would unfairly benefit from his/her wrongful action. As Langstaff J

President of the Employment Appeal Tribunal stated in the English case of **British Heart Foundation v Roy (Debarred)** UKEAT/0049/15/RN, (Transcript) at para. 8:

“Just as all contracts of employment contain an implied term on the part of the employer that it will not act without reasonable or proper cause so as to damage or destroy the relationship of trust and confidence which exists, or should exist, between employer and employee, so too the employee may be bound by that term, and is undoubtedly bound by the term that the employee is to provide loyal service to the employer. Stealing from an employer is a clear and undoubted breach of those terms. It could not be otherwise. If an employer, knowing of the repudiatory conduct, dismisses an employee for it, the employer is, by doing so, accepting the employee's breach as terminating the need for it, the employer, to continue to perform its side of the bargain which is the employment contract. **In short, if an employee is guilty of repudiatory conduct**, which stealing inevitably is, **then except perhaps in the most exceptional circumstances** (which for myself I cannot readily bring to mind, but I am prepared to accept may possibly exist), **an employer is entitled to dismiss that employee without notice. The employer, by doing so, is not in breach of the contract. It is the employee's breach which causes the termination.**” (Emphasis supplied)

[24] It should be further noted that, in considering whether a dismissal is wrongful, the employee's record is also relevant: **Pepper v Webb** [1969] 2 All ER 216. The appellant in his searching cross-examination of the respondent mainly confined himself to interrogating the respondent's non-acceptance that he left on a family emergency; when and where he was fired; and whether he had asked the respondent for and been denied assigned duties. He did not take issue with or address the significant portions of the respondent's evidence which lamented his failure to do the respondent's work due to preoccupation with his own affairs, which, despite frequent complaints from the respondent, he conducted at the respondent's workshop without the respondent's approval. From the appellant's own lips, the evidence fell that he had his tools and unfinished jobs at the respondent's business place which he agreed to remove before he received his vacation pay. The combined effect of that evidence supports a finding that

the appellant was not providing “loyal service” to the respondent, but was engaged in “feathering his own nest” to the disadvantage of the respondent. In the words of the respondent, “...effectively he has terminated himself by carrying out his own business on my time and expect me to pay him”.

[25] It is therefore clear that, on the evidence, it was open to the LJPC to accept that the appellant’s contract of employment had been justifiably terminated for cause on 2 October 2017, weeks before the parties met at the Ministry of Labour. That finding would have provided an entirely reasonable basis for the LJPC to enter judgment for the respondent and decline to award the appellant the sums claimed, either for payment in lieu of notice or outstanding salary. Nothing that the appellant has advanced before us has suggested that the LJPC was plainly wrong or arrived at any conclusions unsupported by the evidence. Consequently, the appeal should be dismissed and the judgment of the LJPC affirmed.

SIMMONS JA

[26] I, too, have read, in draft, the judgment of my learned brother, D Fraser JA. I agree with his reasoning and conclusion and have nothing useful to add.

STRAW JA

ORDER

- (1) The appeal is dismissed.
- (2) The judgment of Her Honour Mrs Mitsy Beaumont-Daley is affirmed.
- (3) No order as to costs.