IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF GUYANA

(COMMERICAL JURISDICTION)

2017-HC-DEM-CIV-SOC-63

BETWEEN:

BIDIADHAR DEOKARRAN

Claimant

And

NOBLE HOUSE SEAFOODS LTD

Defendant

BEFORE THE HON. *NARESHWAR HARNANAN, J.*

APPEARANCES:

Mr. Timothy Jonas for the Claimant

Mr. Donald Trotman for the Defendant

DECISION:

Brief facts:

1. The claimant seeks damages for personal injury suffered as a result of the negligence of the defendant, and for wrongful dismissal.
2. He contends that whilst in the defendant's employ as a security guard with oversight of the defendant's wharf on the demerara river, which was in an advanced state of disrepair, and whereupon he slipped on a slick of grease and oil residue thereon, fell and sustained injury to his back on the 17th November, 2016.
3. He contends that upon later that month he was handed a letter dated the 17th November, 2016, which purported to summarily dismiss him.
4. The defendant denies that their wharf were in a state of disrepair and put the claimant to strict proof thereof, in addition to that it was coated with grease and oil, and as such contend that he is not entitled to the relief sought under this head.

5. The defendant however admits dismissing the claimant with immediate effect as he assaulted a female security guard on the said 17th November, 2016, while in an inebriated state. They contend that this constituted serious misconduct on duty, which had a detrimental effect on the defendant's business, and were therefore justified in dismissing him summarily.

Issues:

6. (i) Whether the defendant is liable in damages for negligence?

(ii) Whether the defendant is liable in damages for wrongful dismissal?

Negligence:

7. Negligence[1], simply put, is conduct by one person which breaches a duty incumbent on him to take care, which results in loss, damage or injury to another person. Therefore, the elements of negligence which must be proved by a claimant are:

(a) The existence of a duty to take care;

(b) The breach of that duty by the defendant

(c) Consequential loss suffered by the claimant

8. ***Clerk & Lindsell on Tort,*** 18th edition, explain at paragraph 7-221 of the text that:

> There is a duty to see that a reasonably safe place of work is provided and maintained. The place of employment should be as safe as the exercise of reasonable care and skill permits; it is not enough for the employer to show that the danger on the premises was known and fully understood by the employee.

9. Apart from legislative schemes, there is a general duty at common law that employers have a duty to take reasonable care for the safety of their employees surrounding the circumstances of their employment. In ***Houghton v. Hackney Borough Council*** [1961] 3 KB 615, Lord Diplock, at page 618 of the report proposed the test to apply was to answer the question:

> *…has the employer taken reasonable care, paying special attention to the risk and paying reasonable attention to other circumstances?*

10. In ***Turner v South Australia*** [1982] 56 ALJR 839, the Australian High Court augmented that test at page 840 of the report, thus:

[1] See Winfield & Jolowicz on Tort, 14th Edn. at page 78 of the text

> …where it is possible to guard against a foreseeable risk which, although perhaps not great, nevertheless cannot be called remote or fanciful, by adopting a means which involves little difficulty or expense, the failure to adopt such means will, in general, be negligent.

11. The claimant contended and testified, in essence, that the defendant's wooden wharf had rotted parts with missing boards resulting in gaps in the flooring. He testified that oil and grease and other rubbish and liquid are spilt on the flooring making it slippery in places. It is on that grease and oil he said that he slipped, fell and injured his back.

12. The defendant's witness Ingrid Carrol testified that there is a wooden and concrete wharf. The wooden wharf she accepted is not in good condition in that there are old boards and probably some places where some boards are rotted. She however maintained there are no missing boards and she would not be afraid to traverse on it. She was forthright in maintaining there was no oil on the wharf and besides the grease residue from metal ropes on the wharf, in her view, it was not plausible to slip thereon.

13. Clearly, a duty is owed by the defendant company to its employees to take reasonable care to provide a safe place, and system of work. The testimony of the Claimant was that he slipped on grease and oil which was on the wharf. However, the Claimant also did admit in cross examination that he is a diabetic and when his diabetic state is heightened, he suffers from dizziness resulting in swaying and staggering. He also did admit that his diabetes 'acted up' that morning.

14. The presence of oil and grease on a city wharf on and over which boats are repaired or loaded and discharged, and diesel pumped must be expected. Even the disclosure by the defendant's witness indicates that metal ropes have grease and there must be residue of that grease on the wharf.

15. What is missing from the evidence on a balance of probabilities which may have afforded the Court the opportunity to assess, is the quantities of residue of oil and grease, and absence of a system by the defendant company to keep the wharf in a manner which is safe for its employees. Together with the disclosure by the claimant that his diabetes 'acted up' that morning, and even if he did fall, this Court cannot find on the admissible evidence before it that the defendant was negligent in the

manner complained of in this action. The claim for relief under this head is therefore refused.

Wrongful dismissal:

16. According to **Halsbury's Laws of England, Volume 39 (2014), paragraph 825**, a wrongful dismissal is a dismissal in breach of the relevant provision in the contract of employment relating to the expiration of the term for which the employee is engaged. To entitle the employee to sue for damages, two conditions must normally be fulfilled, namely:

    (i) the employee must have been *engaged for a fixed period*, or for *a period terminable by notice*, *and dismissed either before the expiration of that fixed period or without the requisite notice*, as the case may be; and

    (ii) his dismissal must have been without sufficient cause to permit his employer to dismiss him summarily. [emphasis supplied]

17. The decision of the Supreme Court of Canada, *per Bastarache J.* in ***Honda Canada Inc. v. Keays*** [2008] 2 S.C.R. 362, at pages 387 – 388 of the report, summarised the current state of the law thus:

> [50] An action for wrongful dismissal is based on an implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship in the absence of just cause. Thus, if an employer fails to provide reasonable notice of termination, the employee can bring an action for breach of the implied term (***Wallace***, at para. 115). The general rule, which stems from the British case of ***Addis v. Gramophone Co.***, [1909] A.C. 488 (H.L.), is that *damages allocated in such actions are confined to the loss suffered as a result of the employer's failure to give proper notice and that no damages are available to the employee for the actual loss of his or her job and/or pain and distress that may have been suffered as a consequence of being terminated*. This Court affirmed this rule in ***Peso Silver Mines Ltd. (N.P.L.) v. Cropper***, [1966] S.C.R. 673, at p. 684:
>
> > . . . the damages cannot be increased by reason of the circumstances of dismissal whether in respect of the [employee's]

wounded feelings or the prejudicial effect upon his reputation and chances of finding other employment.

[51] Later in ***Vorvis v. Insurance Corp. of British Columbia***, [1989] 1 S.C.R. 1085, *McIntyre J.* stated at p. 1103:

> . . . I would conclude that while aggravated damages may be awarded in actions for breach of contract in appropriate cases, this is not a case where they should be given. The rule long established in the ***Addis*** and ***Peso Silver Mines*** cases has generally been applied to deny such damages, and the employer/employee relationship (in the absence of collective agreements which involve consideration of the modern labour law regime) *has always been one where either party could terminate the contract of employment by due notice, and* ***therefore the only damage which could arise would result from a failure to give such notice***.

18. Lord Dyson, in the UK Supreme Court decision in ***Edwards (Respondent) v Chesterfield Royal Hospital NHS Foundation Trust (Appellant) Botham (FC) (Respondent) v Ministry of Defence (Appellant)*** [2011] UKSC 58 at paragraph 19 of the report stated that the ***Report of the Royal Commission on Trade Unions and Employers' Associations*** 1965-1968 (Cmnd 3623) ("the Donovan report") acknowledged that:

> "An employee has protection at common law against 'wrongful' dismissal, but this protection is strictly limited; it means that if an employee is dismissed without due notice he can claim the payment of wages he would have earned for the period of notice....Beyond this, the employee has no legal claim at common law, whatever hardship he suffers as a result of his dismissal. Even if the way in which he is dismissed constitutes an imputation on his honesty and his ability to get another job is correspondingly reduced he cannot—except through an action for defamation—obtain any redress (see the decision of the House of Lords in [***Addis v Gramophone Co Ltd*** [1909] AC 488])."

19. Further, he referred to the headnote in ***Addis*** that:

> "Where a servant is wrongfully dismissed from his employment the damages for dismissal cannot include compensation for the manner of the

dismissal, for his injured feelings, or for the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment"

20. In ***British Home Stores v. Burchell*** **[1978] IRLR 96**, *Arnold, J.* described the issues to be considered where there has been a dismissal by an employer who believes that his employee has been guilty of misconduct, thus:

> The case is one of an increasingly familiar sort in this Tribunal, in which there has been a suspicion or belief of the employee's misconduct entertained by the management, it is on that ground that dismissal has taken place, and the tribunal then goes over that to review the situation as it was at the date of dismissal. The central point of appeal is what is the nature and proper extent of that review. We have had cited to us, we believe, really all the cases which deal with this particular aspect in the recent history of this Tribunal over the three or four years; and the conclusions to be drawn from the cases we think are quite plain. What the tribunal have to decide every time is, broadly expressed, ***whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time***. *(emphasis supplied)*

21. To reach a 'reasonable suspicion', *Arnold J.* explained that the onus of proof is on the employer to show the ingredient elements which reasonably lead to that suspicion. He noted:

> First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. ***It is the employer who manages to discharge the onus of demonstrating those three matters***.

22. The evidence is clear before the Court that the claimant was dismissed by the defendant company summarily, for fault. The defendant's evidence in their pleadings, and at the hearing, attempted to demonstrate why they were justified in dismissing the claimant.

23. What is missing from the pleadings and the evidence is the manner or the steps taken to dismiss the claimant. The letter of dismissal is clear in conveying the act of dismissal for fault, being an alleged assault of a fellow employee by the claimant, and him appearing to be under the influence of alcohol.

24. The evidence also before the Court suggests that the defendant company did not afford the claimant a hearing into the aforesaid allegations of assault and drunkenness on duty. In fact, by the defendant's case and the admission in the testimony of Nandy Robinson, the only meeting with the claimant and defendant company officials was about a week after the dismissal took effect.

25. In ***British Homes***, *Arnold, J.* said further:

> In these proceedings we are not concerned with whether Miss Burchell was guilty or innocent of the offences charged against her but whether the respondents had reasonable grounds for believing that she had committed the offences when they dismissed her on 28 October 1977.

26. In that case, upon receiving information of dishonesty, the employer deputed an internal detective/auditor to investigate. The auditor found four separate occasions of breaches by the employee. The employee was then involved in a hearing and was invited to bring and did bring a friend from the workplace as support. The employer after that hearing was satisfied as to her misconduct and dismissed her. The dismissal was found upon appeal to be fair.

27. In the instant matter, there was no evidence of a hearing conducted by the defendant company before summarily dismissing the claimant, even if the circumstances could be justified, if occurring as a matter of fact. A fact which could have been easily proved since there was reference made to a video recording in the letter of summary dismissal.

28. ***Lockton,*** on ***Employment Law***, 2nd edition, states at p. 208 of the text:

> Without doubt one of the most important aspects of fairness is the procedure the employer uses before dismissing the employee. Failing to use a procedure or using a procedure unfairly will almost certainly mean

that a dismissal is unfair. A reasonable employer has a fair procedure and adheres to it.... Instant dismissal without an investigation will almost always be unfair. When the employee is the subject of an investigation, he should be told the scope of the investigation and the facts and the maters alleged against him. The employer should normally give the employee the opportunity to explain....

29. In ***Employment Law,*** 4th edition, ***Pitt*** states at p. 259 of the text that:

> A reasonable investigation where facts are in dispute would involve talking to any witnesses, gathering relevant documents and, crucially, putting the charges to the employee. In ***Weddel v. Tepper*** [1980] IRLR 1996, the unfairness was held to reside principally in the fact that the employer decided to dismiss without hearing first whether the employee had any explanation for the suspicious conduct.

Conclusion:

30. In the circumstances, it is the finding of this Court that the claimant was wrongfully dismissed and entitled to damages equivalent to two weeks salary at the time of dismissal, and all severance benefits computed under the ***Termination of Employment and Severance Pay Act***. There will be a further order of costs to the claimant in the sum of **$150,000.00.**

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Nareshwar Harnanan
Puisne Judge
04 May 2018