[2010] CA (Bda) 5 Civ

The Court of Appeal for Bermuda

CIVIL APPEAL No. 23 of 2009

Between:

ALLISON THOMAS

Appellant

-V-

FORT KNOX BERMUDA LTD ET AL

Respondent

Before: **Zacca, President**
Evans, JA
Stuart-Smith, JA

Date of Hearing: Tuesday, 9 March 2010
Date of Judgment: Thursday, 18 March 2010

Appearances: Mr. M. Diel for the Appellant
Mr. B. Adamson for the First Respondent
Mr. A. Martin for the Second Respondent

Judgment

Evans, JA

1. This is an application for leave to appeal from a Ruling (in Chambers) by Mr. Justice Bell dated 3 December 2009. On the First Defendants' application, he struck out one of the Plaintiff's heads of claim against the First Defendants, who are his former employers, on the ground that that claim was bound to fail.

2. The Court indicated, at the hearing of this application on 8 March 2010, that it would hear full submissions from both parties and, if leave to appeal was given, would treat it also as the hearing of the appeal.

3. The Plaintiff was employed as the First Defendants' Chief Operations Officer from about September 1999 until 1 November 2005. On that date, his employment was terminated with immediate effect, and he received one month's salary in lieu of notice.

4. He commenced this action in 2006 claiming damages for breach of his employment contract. The Statement of Claim alleged that it was an implied term of the contract that he was entitled to receive reasonable notice of termination and that a reasonable notice period was not less than nine months.

5. The Statement of Claim also included the claim which is disputed in these proceedings. Paragraph 8 read –

> *8. Further and in the alternative the termination of the Plaintiff's employment is in breach of the Employment Act 2000.*

6. The First Defendants applied to strike out that paragraph and, as stated above, Mr. Justice Bell granted that application. On 17 December 2009 he refused the Plaintiff's application for leave to appeal, which is now renewed before this Court.

7. Meanwhile, the First Defendants had produced a letter dated 27 February 2002 which, they contend, sets out the Plaintiff's terms of employment. Attached to the letter was a copy of their "Employee Handbook" (or Employee Manual) which set out "details of the Company's policy and other terms of your employment, including, but not limited to:

- Notice periods……”.

8. Under the heading “Resignations or termination of employment” the Manual provided –

> *Should it become necessary for the company to terminate employment for reasons other than cause……monthly paid employees will receive one month’s notice or payment in lieu of notice.*
> *If an employee feels that he has been terminated for improper reasons, he shall have the right to appeal that decision through the employee complaint procedure.*

9. So far as we are aware, no reasons were given for the termination notice handed to the Plaintiff on 1 November 2005. We should emphasise that this application is concerned solely with the allegation made in paragraph 8 of the Statement of Claim that the First Defendant acted in breach of the Employment Act 2000 (“the Act”).

The Act – Termination of Employment

10. The pleading does not indicate what particular provision(s) of the Act are alleged to have been breached, but as will appear below the reference is to section 18. That section was amended in 2006. It appears in Part IV of the Act headed “Termination of Employment” and under the sub-heading “General Provisions”. In its original form, it provided –

> *Termination of employment”*
> *18. (1) Except as otherwise provided by sections 25 to 27, an employee’s contract of employment shall not be terminated by an employer unless there is a valid reason for termination connected with –*
> *(a) the ability, performance or conduct of the employee; or*
> *(b) the operational requirements of the employer’s business, and unless the notice requirements of section 20 have been complied with.*
>
> *(2) Subsection (1) does not apply where ……*

(3) An employee's contract of employment may be terminated by the employee for any reason in accordance with the notice requirements of section 20.

11. Section 20 of the Act sets out minimum periods of notice in writing which in the present case would be one month. Subsection (2) provides that the statutory notice periods do not apply *inter alia* when the employer is entitled summarily to dismiss an employee under the Act. The circumstances in which the employer is entitled to dismiss without notice for serious misconduct are set out in section 25, and for "unsatisfactory performance" in section 27. Those are the two sections to which section 18 is expressly made subject (see above). Section 21 provides for payment of wages etc. in lieu of notice.

12. Following sections in Part IV of the Act are headed "Unfair dismissal" (section 28), "Constructive dismissal" (section 29) and "Redundancy etc." (section 29 and following). Section 28 reads –

Unfair dismissal

28 (1) The following do not constitute valid reasons for dismissal or the imposition of disciplinary action (paragraphs (a) to (i) include matters such as race, sex, religion, age, trade union activities etc).
(2) The dismissal of an employee is unfair if it is based on any of the grounds listed in sub-section (1).

The issue

13. The issue raised for decision is whether the Plaintiff is entitled to claim damages for breach of the statutory right given by section 18(1) that his contract was not to be terminated except for a valid reason, even where the required statutory and/or contractual notice was given, or wages paid in lieu of notice.

14. The parties apparently are not agreed as to whether the case is governed by the original or by the amended version of section 18,

but neither contends that any of the differences are relevant for present purposes. As amended by section 5 of the Employment Amendment Act 2006, section 18(1) reads-

> *18(1) An employee's contract of employment shall not be terminated by an employer unless there is a valid reason for termination connected with –*
>
> *(a)the ability, performance or conduct of the employee; or*
>
> *(b)the operational requirements of the employer's business.*
>
> *(1A) An employee's contract of employment shall not be terminated by an employer under sub-section (1), unless the notice requirements under section 20 and the provisions of sections 26 or 27 have been complied with.*

Further, sub-section 4 was added –

> *(4) Notwithstanding sub-sections (1) and (1A), an employee's contract of employment may be terminated by the employer without notice, for serious misconduct, under section 25.*

15. Mr. Mark Diel for the Plaintiff submits that the employee's rights are as set out in Part IV of the Act, including those stated in section 18, and that they may be enforced by action in the Courts. Mr. Adamson for the First Defendant contends that the section 18 rights may only be enforced by application to the Employment Tribunal in accordance with the statutory procedures set out in Part V of the Act, headed "Enforcement", and in the Schedule. [Both counsel made constructive and helpful submissions for which the Court is grateful.]

The Act – Enforcement provisions

16. The provisions of Part V of the Act may be summarised as follows. Section 35(1) establishes the Employment Tribunal, which by subsection (2) has "jurisdiction to hear and determine complaints and other matters referred to it under this Act". The employee has the right to complain in writing to an Inspector appointed by the

Minister, who must first inquire into the matter (section 37(1)), then attempt conciliation under subsection (3), and if he is unable to effect a settlement he must refer it to the Tribunal.

17. Section 38(1) requires the Tribunal to hold a hearing and give both parties the opportunity to present evidence on oath and make submissions. Section 38 continues -

> *(2) In any claim arising out of the dismissal of an employee it shall be for the employer to prove the reason for the dismissal, and if he fails to do so there shall be a conclusive presumption that the dismissal was unfair.*

18. There are express references to unfair dismissal (above) and to constructive dismissal (section 38(3)) but it is not suggested that the jurisdiction of the Tribunal is limited to those kinds of claim. To the contrary, its jurisdiction is stated in general terms ("complaints and other matters referred to it under this Act"(section 35(2)), and complaints may be made that the employer has "failed to comply with any provision of this Act" (section 36(1)). It is clear, therefore, that its jurisdiction includes claims e.g. where the employer has dismissed summarily for alleged serious misconduct, or where the employee claims that he was not given the appropriate statutory or contractual notice.

19. However, sections 39 and 40 do distinguish between claims for unfair dismissal and other claims. Section 39 is headed "Remedies: general". It empowers the Tribunal to order the employer to do any specified act which in its opinion constitutes full compliance with the Act, and to pay "any unpaid wages or other benefits owing to the employee" (section 39(1)). Section 40 deals only with "Remedies: unfair dismissal". These remedies include an order for reinstatement or reengagement, and a compensation order which takes account, not only of the unfair dismissal, but also of "the extent to which the employee caused or contributed to the

dismissal" (section 40(4) (b)). Finally, the compensation is limited to a sum calculated by reference to the number of weeks of continuous employment, but with a limit "up to a maximum of 26 weeks wages".

20. Section 41(1) gives a right of appeal to the Supreme Court on a point of law.

21. Section 48 provided for a transitional period of one year following the commencement of the Act in respect of which an inspector's powers are limited.

The common law background

22. The common law background may be summarised as follows. The terms of employment are those defined in the contract of employment, including any which are implied (e.g. termination without cause only on reasonable notice to the employee) and any which are imported by statute. The employer can terminate the contract summarily "for cause", that is to say, when the employee has committed a breach which under general principles of contract law is regarded as repudiatory, justifying immediate rescission of the contract. But these general principles are modified, in the case of employment contracts, by the further rule that the employer is entitled to terminate the employment, as distinct from the contract, forthwith, whether or not good cause exists. That right arises as the corollary of the proposition that the Courts will not order specific performance of such a contract. It follows, when the employer terminates on the ground of repudiatory breach, that the employee has no right to insist on further performance of the contract unless and until he chooses to rescind; and when the employer has failed to give contractual notice, the employee's remedy is limited to recovering damages representing his loss of remuneration and other benefits during the period of notice denied to him.

23. It is axiomatic, of course, that the employer can enforce his common law rights, modified as they may be by relevant statutory provisions, by action before the Courts. Essentially, the cause of action is a claim for damages for breach of contract, and in cases of premature termination it may be characterised as a claim for wrongful dismissal.

Unfair dismissal – the United Kingdom position

24. The statutory concept of "unfair dismissal" was introduced in the United Kingdom by the Industrial Relations Act 1971, followed by the Employment Rights Act 1996. The same legislation established Employment Tribunals in which the employee's rights could be enforced. That was in response to recommendations made by a Royal Commission "which concluded that it was urgently necessary for employees to be given better protection against unfair dismissal and recommended the establishment of statutory machinery to achieve this" (quoted from paragraph 16 of the judgment of Bell J. in the present case).

25. In *Johnson v. Unisys* [2001] ICR 480 the House of Lords considered whether those statutory provisions had given the employee further common law rights which could be enforced by action in the Courts. For reasons given primarily by Lord Millett and Lord Hoffman, quoted by Bell J. in the present case, it was held that the United Kingdom statutes did not. We gratefully adopt paragraphs 17 – 19 of his judgment, and his summary of the resulting position in the United Kingdom-

> *a. the new legislation left the common law and the contract of employment itself unaffected;*
> *b. in particular, the new legislation did not import implied terms into the contract of employment;*

> *c. instead it created a new statutory right not to be unfairly dismissed, enforceable by application to an employment tribunal;*
>
> *d. employment tribunals thus have an exclusive jurisdiction to hear and adjudicate upon claims for unfair dismissal;*
>
> *e. no such claims can be brought before the ordinary civil courts;*
>
> *f. however, claims for wrongful dismissal (dismissal in breach of the terms of an employment contract) can be so brought.*

26. We add to this merely that Lord Hoffman emphasised, quoting from a judgment by McLachlin J. of the Supreme Court of Canada in *Wallace v. United Grain Growers Ltd.* (1997) 152 DLR (4th.) 1, 39, that "a 'wrongful dismissal' action is not concerned with the rightness or wrongness of the dismissal itself", that is to say, the Court is not concerned with the reasons for the dismissal. (That was in the context, we respectfully add, of claims for wrongful dismissal based on the employer's failure to give contractual notice, or to pay compensation in lieu.) Lord Hoffman acknowledged that the Courts might have expanded the common law by implying further terms regarding dismissal in the contract of employment, but that would be contrary to the legislation –

> *For the judiciary to construct a general common law remedy for unfair circumstances attending dismissal would be to go contrary to the evident intention of Parliament that there should be such a remedy but that it should be limited in application and extent. (paragraph 58)*

Legislation in the Cayman Islands and Bermuda

27. Consistently with the House of Lords judgment, it has been held that corresponding legislation in the Cayman Islands does not add to the employee's rights enforceable by action in the civil courts. In *Thomas v. Cayman Islands National Insurance Company* [2007] CILR 96, Sanderson Ag. J held –

> *(4) The plaintiff was not entitled to compensation for unfair dismissal and retirement allowance as such claims could not form part of a common law claim for damages for wrongful dismissal. Although the Labour Law……provided that an employee "may" file a complaint with the Director of Labour, the language was not intended to be broadly permissive, so as to allow a range of other applications for this relief. The purpose of the statutory scheme was to ensure that such claims could only be brought before the Labour Tribunal and the court had no jurisdiction to entertain them. (H.N. and judgment paras. 65-66).*

28. In Bermuda, the relationship between the employee's statutory rights and his common law rights, enforceable by action through the Courts, has been considered by Kawaley J. in *Quinton Robinson v. Elbow Beach Hotel* [2005] Bda.L.R.8. In that case, the employee had made a complaint to the Human Rights Commission which was being investigated by a board of inquiry appointed by the Minister; he also commenced an action against his former employer which Kawaley J. described thus –

> *The Plaintiff's sole claim is for "wrongful dismissal", either at common law or (perhaps) for breach of section 25 of the Employment Act itself. (page 8 line 19)*

Kawaley J. exercised his discretion in favour of granting a stay of the court action, pending the determination of the board of inquiry proceedings (page 3 line 36). He also addressed under the heading "Effect of Employment Act 2000 on Common Law Wrongful Dismissal Claims" what he called counsel's "bold submission" that the Act "constituted a comprehensive and exclusive statutory code for determining claims for wrongful dismissal. As a result, this Court had no jurisdiction to entertain a common law or statutory wrongful dismissal claim." He rejected that submission, holding that "very clear statutory words are required to interfere with the constitutional right of access to the Court for the determination of civil rights and obligations" (page 4 line 11) and no such express words are found in the Act. That was "irrespective of whether his

wrongful dismissal claim is based on the common law or section 25 of the 2000 Act itself), but he noted a concession by counsel for the employer that if the claim "had in fact been referred to the Tribunal (and not rejected by the inspector)….a civil claim in respect of the same claim might well be barred".

29. In the present case, Mr. Adamson did not challenge Kawaley J.'s ruling that the Act does not preclude the Court from hearing wrongful dismissal claims. He reserved his position with regard to whether it might be correct that the Court can enforce a claim for breach of section 25 of the Act as distinct from his common law i.e. non-statutory rights. We can see no reason for dissenting from Kawaley J.'s broad conclusion that the Act does not detract from the employee's constitutional right of access to the civil courts in order to enforce his common law. In the judgment appealed from, Bell J. held that Kawaley J. "did not and did not need to make any finding as to whether a claim for unfair dismissal under the Act could be pursued through the courts. That was not the issue before him" (paragraph 26). We agree that the earlier judgment is distinguishable in that way, but we would add that, if and to the extent that Kawaley J. was dealing with a claim for breach of section 25 of the Act, rather than for breach of common law rights, the judgment does provide some support for Mr. Diel's submissions in the present case.

The Judgment

30. The learned judge analysed the provisions of the Act in paragraphs 21–22 of his judgment and stated his conclusion in paragraph 31 –

> *Although paragraph 8 of the statement of claim does not refer in terms to the unfair dismissal provisions of the Act, there can be no other reason for relying upon the Act save to found a claim for unfair dismissal. Such a claim is unknown to the common law. It is a creature of statute and can only be pursued following the procedures provided for in the Act. I therefore find that*

> *the effect of the passing of the Act in Bermuda is as I have found the position to be in the United Kingdom……It follows, in my view, that a claim before this Court which ignores the procedures provided for in the Act is abusive…….* .

Submissions

31. Mr. Diel's primary submission is that the Judge was wrong to equate the position under the Act in Bermuda with the position in the United Kingdom under different legislation. He relies upon section 2(2) of the Act, which reads "An agreement to waive any of the requirements of this Act and the regulations is of no effect". He submits that the claim is not one for breach of statutory duty; rather, it is for breach of contract and therefore one over which the Court has jurisdiction. The dismissal was wrongful, because no valid reasons were given. Any contractual term which provides otherwise is of no effect.

32. In order to make the Plaintiff's position clearer, Mr. Diel sought leave from the Judge to amend the Statement of Claim so as o include his reliance upon section 2(2) of the Act as explained above. The Judge adjourned the application, and Mr. Diel accepted before this Court that the amendment was not necessary for the purposes of the appeal.

33. Implicit in Mr. Diel's submissions is his contention that Part IV of the Act contains a statutory code, including both the provisions regarding unfair dismissal and, for example, section 25, which Kawaley J. indicated might establish a statutory basis for a claim for wrongful dismissal. This was also recognised by Bell J. who said in paragraph 8 of his judgment ".....no doubt an argument can be made that a dismissal pursuant to section 25 is a wrongful dismissal if serious misconduct is not established".

34. Mr. Adamson contended that "unfair dismissal" is a label for breach of statutory rights and that the Act should be read as a whole. It provides for enforcement by an Employment Tribunal whose procedures and remedies are wholly different from those of the civil courts. The statutory limitation period is three months; the compensation is limited; the Tribunal has power to order reinstatement, but limits are imposed upon it by the Act itself. If the employee can elect to bring court proceedings, he can by-pass the statutory machinery involving inspectors, even the Tribunal itself. In summary, the position in Bermuda is the same as in the United Kingdom: the rights given by sections 18 and 28 can only be enforced as the Act provides. The employee's common law rights are unaffected by these provisions of the Act, and it is those rights alone which can found a claim before the Courts.

35. Mr. Adamson made no submission as to whether other sections in Part IV of the Act, specifically the summary dismissal provisions in section 25, affect the common law rights of the employee or, put another way, create rights which the Courts can enforce. He suggested that those were matters of general interest which could be better addressed by the Attorney General than by him. But he did not provide any reason why section 25 might create an enforceable right, whilst sections 18 and 28 do not. He limited his submission to those two sections.

Conclusion

36. Sections 18 to 33 constitute Part IV of the Act under the heading Termination of Employment and are expressed in general terms, with no indication that they are intended merely to provide a code for proceedings before the Employment Tribunal, but not to affect the contractual rights which employers and employees can enforce in the Courts. There is nothing which suggests that the Courts' jurisdiction is excluded, as Kawaley J. has held that it is not, nor is

it easy to infer that the Act was intended to create two separate codes, one for the Employment Tribunal and another for the Courts.

37. However, it is not necessary to decide in the present case whether that is the effect of the Act. We can assume in the Plaintiff's favour that the sections 18 and 28 do create rights which are incorporated in the contract of employment. But it does not follow that the employee is entitled to recover compensation for unfair dismissal, as the Plaintiff contends. In our judgment, he is not.

38. The reason in essence is that the statutory rights come with strings attached; they come with their procedural baggage. There is no common law concept of unfair dismissal, and no common law remedies that flow from it. The statutory creation consists not merely of the right but also the remedy for its breach, and it is that package which the Courts can recognise. But the common law remedy of damages is not included in it.

39. The matter can be tested in this way. The employee gains the right to obtain statutory compensation for unfair dismissal, together with a contractual or common law right to have his complaint considered by the Inspector and the Tribunal as the Act prescribes. That right could be enforced by the Courts, if the need to do so were to arise, and the employee is protected from the risk, emphasised by Mr. Diel, that he would be left without remedy in a case where the Inspector refused his complaint on inadequate grounds.

40. The Judge included in his reasons that the claim for unfair dismissal "is a creature of statute and can only be pursued following the procedures provided for in the Act". Essentially for that reason, in our judgment he was correct in striking out the

claim. The application for leave to appeal is granted but the appeal must be dismissed.

_____

Evans, J.A.

Zacca, P.

I agree that this appeal should be dismissed for the reasons given by Evans, J.A.

_____

Zacca, President

STUART-SMITH, J.A.

1. I agree that this appeal should be dismissed for the reasons given by Sir Anthony Evans, J.A. I only wish to add a few words of my own one aspect of the case. The position in the UK was authoritatively stated in *Johnson and Unisys* [2001] 1CR 480 in the judgments of Lord Hoffman and Lord Millett. It is clear that the statutory provisions contained in the Industrial Relations Act 1971 and the Employment Rights Act 1996, provide a statutory code enforceable through the Employment Tribunals. Those provisions do not affect the common law cause of action for wrongful dismissal; in particular terms cannot be implied into the contract of employment based on the provisions of the statutes.

2. While the language of the Bermudian statute is not precisely the same as the U.K. Statute, it seems to me inconceivable that the Bermudian Parliament intended to enact a system which was so much at variance with the U.K. model that the provisions of the statute could be relied upon as express or implied terms of the contract, and therefore enforceable through the courts. In my

judgment sections 18 – 29 of the Act enact rights which were enforceable solely by means of the statutory provisions in part 5 of the Act. These provisions do not affect common law action wrongful dismissal in any way. This seems to me to be the logical conclusion on Mr. Adamson's submissions, though he disclaimed the contention that some parts of the provisions of part 4 of the Act, specifically section 25, might not affect the common law rights of employees. He said that this was a matter which would better be addressed by the Attorney General. The provisions of section 25 are closely akin to the common law position, though possibly somewhat more favourable to the employer. For my part I cannot see why exceptionally this section should give rights enforceable by an action at law. It would be an action for breach of statutory duty, which adds little or nothing to the common law and would give rise to barren distinctions between the two. The purpose of section 25, it seems to me, is to enable the inspector and the Tribunal to entertain jurisdiction in cases which are essentially cases of wrongful dismissal. Without this provision a claimant might have to pursue his case of unfair dismissal under the statutory code and bring an alternative claim for wrongful dismissal in the courts. This is obviously undesirable. Section 25 enables such claims to be dealt with in one hearing before the Tribunal. Accordingly, I must not be taken as agreeing with the dictum of Kawaley J. in *Quinton Robinson v. Elbow Beach Hotel* [2005] Bda L.R. 8 at page 2 that an action for wrongful dismissal in the courts might perhaps be based on a breach of section 25 of the Act. Although it may make little practical difference, in my opinion an action for breach of contract must be based on common law principles and is not affected by section 25.

_____

Stuart-Smith, J.A.