IN THE SUPREME COURT OF BERMUDA
APPELLATE JURISDICTION
2009 No. 43

BETWEEN:

ISLAND ENGINEERING LTD.

Appellant

- and -

DEREK BRADSHAW

Respondent

Mr. Froomkin QC for the Appellant; and
Mr. James for the Respondent.

JUDGMENT
(extempore)

1. First of all, in respect of the way the learned magistrate dealt with the original plaintiff's claim, I see no reason to interfere with that. This is essentially a small claims court or a court of summary jurisdiction, and it is plain from his judgment that the learned acting Magistrate did not accept or believe the plaintiff's evidence on cleaning and the tools. He was entitled to do that. The amounts concerned are not large, and I do not think in fact that he was obliged to give further reasons than he did.

2. The finding he made in respect of the rent, $1,925, is that contended for by Mr. Burrows in his evidence. The only other aspect of the plaintiff's claim, $1,245 for a letter – legal costs – is not, I do not think, adequately pleaded in the summons. So I do not disturb the Magistrate's finding on the plaintiff's claim. He found in their favour in the sum of $1,925.

3. I then turn to the Counterclaim. The learned acting Magistrate seems to have proceeded on the basis that section 9 of the Employment Act introduced an absolute rule of law that all overtime must be remunerated at time and a half. In so doing he misdirected himself as to the terms of the Act, because section 9(2)(b) plainly contemplates the parties coming to an agreement. So the Act sets up a normal rule that overtime should be remunerated at time and a half, but then allows the parties to contract out.

4. I have to say that the provisions are not very happy – it does not say for instance whether the agreement to contract out should be in writing or not. It is silent on that. Given the wording of the rest of the Act, I am afraid that it does seem to allow for oral agreements. In my view that is not a good idea: if parties are to contract out I would have thought that the legislation should require a written agreement, but I have to take the legislation as I find it. It is also unclear whether such contracting out has to go into the statement of terms provided under section 6(2). I suppose it might come under section 6(2)(e) – the gross wage – but it is by no means certain . I would have thought it good practice for employers to include under the particulars in section 6(2)(e) whatever agreement they had come to in respect of overtime. It may be that another court would take a different view and this employer might find themselves in difficulty if they do not include any such agreement in the statutory particulars which they supply.

5. However, in this case, the learned acting Magistrate did not put his mind to any of these questions. He proceeded on the basis of a wrong view of the law. He took the view that it is impossible for the parties to contract out of section 9. That is simply wrong. He therefore failed to conduct the inquiry which he should have conducted into whether in fact they had contracted out. He made no finding on that. In the absence of that inquiry his judgment as to the overtime is wholly defective and I am obliged, I think, to set it aside.

6. He also does not appear to have conducted a proper inquiry at all in his judgment as to the airline ticket, and to the extent that that is, or may be, included in the judgment in the overtime sum I also set that aside. There has to be a proper trial on those two issues. I remit, therefore, the subject of the counterclaim – and I think that it is the whole counterclaim I have to remit - to the Magistrates' Court for retrial and for them to make proper findings of fact in the light of the law.

7. I allow the appeal to that extent – I vacate the judgment on the counterclaim and remit the counterclaim for retrial.

Dated this 21st day of December 2009

Richard Ground
Chief Justice