The Court of Appeal for Bermuda

CIVIL APPEAL No 17 of 2013

Between:

BERMUDA HOSPITALS BOARD

Appellant

-v-

GENEANNE WOODS-FORDE

Respondent

Before: **Zacca, President**
Auld, JA
Baker, JA

Appearances: Mr. Henry Tucker, Appleby (Bermuda) Ltd, for the Appellant
Mr. Peter Sanderson, Wakefield Quin, for the Respondent

Date of Hearing: **2 June 2014**

Date of Decision: **12 June 2014**

Date of Reasons: **17 July 2014**

REASONS FOR DECISION

PRESIDENT

1. This is an appeal against an order by Hellman J whereby he awarded the Respondent damages in the sum of $25,075 for wrongful dismissal. The award for damages included the sum of $20,538.70 for the loss of earnings during a notice period, which the judge calculated at the three months' notice and the sum of $4,536.32 for the loss of health insurance.

2. The Respondent was employed at the King Edward VII Memorial Hospital ("the hospital") full time as a clerk/receptionist in the Diagnostic Imaging Department and part time as a switchboard operator/front desk receptionist.

3. The Respondent was dismissed as a result of a complaint made against her by a co-employee, Hadas Wolffe.

4. The facts briefly were that Miss Wolffe has a son Hazai, who was 6 years old. Every day after school, with the permission of Miss Wolffe's manger, Hazai would go to the hospital and wait there until his mother had finished her shift.

5. On March 23, 2011, having finished her shift, Miss Wolffe went to look for her son. She discovered that he was not where he ought to have been. Miss Wolffe called Hazai's school. She was told that Hazai was not at school but was with a woman named Ms. Forde who had called the school and enquired about Hazai. Hazai was located watching T.V. in the area where the respondent worked.

6. Miss Wolffe made a complaint orally to Ms. Orea Butterfield who managed the Department. She was asked to put her complaint in writing. This she did, stating in the complaint:

> "I am a single mother and it is hard for me already, having to deal with my son's situation at school. I do not appreciate someone that has nothing to (do with) me or my child meddling in my personal business."

7. An investigation into the matter was commenced by Mr. Earlington Raynor, who is the respondent's immediate supervisor. On or about March 30, 2011, the complaint was read out to the respondent who was asked for a written response by 10:00 AM the next day.

8. In her written response, the respondent stated that on the day in question she had seen Hazai running around in an unruly way during work hours in the department. She also stated:

> "I did not call the school, nor did I assist the child with his homework. There is no truth in these allegations."

9. On March 31, 2011 an amended response was provided by the respondent. It omitted the sentence "I did not call the school, not did I assist the child with his homework."

10. On April 8, 2011 a meeting took place between the respondent and three of the appellant's managers, Ms. Butterfield, Mr. Raynor and Maria Pringle. The respondent stated that she wished to be represented and the meeting was adjourned.

11. The respondent was absent from work on several days due to an eye condition which required surgery to her left eye. Her absence was supported by medical certificates. She was accused of delaying the disciplinary proceedings. The trial judge accepted her explanation as the reason for her absence from work.

12. On May 2, 2011 the respondent met with Ms. Butterfield. On that occasion according to Ms. Butterfield, the respondent admitted that she had called Hazai's school. This evidence was accepted by the trial judge. On June 2, 2011 the respondent was suspended with pay.

13. On June 13, 2011 a disciplinary meeting was held. Present were the three mangers and the respondent. She was asked if she had called the school. Having consulted her Attorney, she replied that she had no recollection. Having been confronted with her alleged admission to Mr. Butterfield she stated that she had no recollection of the meeting.

14. On June 30, 2011 a further meeting took place between the respondent, her Attorney and the managers. She was told that the appellant had decided to terminate her contract of employment. A document headed "Disciplinary Action Form" was handed to the respondent. The form contained a list of several types of misconduct to be ticked as applicable, including "dishonesty/theft" and "other". The type of misconduct that was in fact ticked was "other". The details of the misconduct was stated to be:

> "Serious misconduct involving breach of trust and confidence. Dishonesty around the case of complaint of calling an employee's child's school."

15. The learned trial judge made the following findings at paragraph 26 – 32:

> "26. It is implicit in the Form and Ms Pringle's witness statement, and explicit in the witness statements of Ms Butterfield and Mr Raynor, that the Plaintiff was dismissed for two reasons.
>
> 27. First, on account of the allegations in the complaint, which were impliedly upheld and found to involve breaches of trust and confidence. Ms Pringle said in her witness statement that she found the complaint "*particularly concerning*" and that the act of calling the school was itself serious enough to be considered serious misconduct.
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> 28. The second reason was on account of the Plaintiff's dishonest conduct in the face of the investigation: she was impliedly found to have lied about both the telephone call and having no recollection of having admitted to Ms Butterfield that she had made the call.
>
> 29. At trial, however, the Defendant relied solely on the Plaintiff's dishonesty surrounding the investigation, submitting that this was gross misconduct in the sense of a repudiatory breach of contract for which the Defendant was entitled to dismiss her without notice.

> 30. Thus Ms Pringle stated that phoning the school was not the issue and that throughout the investigation the issue was the act of being dishonest. Later, she said that calling the school was not severe – it was the dishonesty around the investigation that was severe. When confronted with her witness statement, however, she said that she still felt that calling the school was serious.
>
> 31. Ms Butterfield said in evidence that the breach of confidence was particular to the investigation. Mr Raynor said in evidence that he could not recall what the confidence was that had been breached.
>
> 32. I find that the Defendant's attempts to downplay the significance to the decision to dismiss of the conduct that gave rise to the complaint are unconvincing."

16. The respondent accepted in evidence that she had lied about calling the school, but maintained that she was not guilty of gross misconduct. After considering various provisions of the applicable Bermuda Hospitals Board Policies including a Code of Conduct dated September 17, 2010, Hellman, J concluded that the dishonest conduct in the course of the investigation did not amount to gross misconduct and that the dismissal of the respondent was wrongful.

17. The respondent filed a Respondent's Notice of Intention to Contend that the Decision of the Supreme Court be Varied. This relates to damages which were not awarded by Hellman J as follows:

> (1)That the [respondent] shall be awarded damages equivalent to two months' wages in the amount of $13,646 to compensate her for the time it would have taken the Cross Respondent to follow the contractual disciplinary procedures;
> (2)That the [respondent] shall be awarded damages for the full sum of her medical expenses incurred up until December 2011 in the sum of $25,871.84 rather than the $4,536.32 awarded;
> (3)That the [respondent] shall be awarded for damages for loss of reputation suffered due to the manner of her dismissal in the amount of her loss of earnings until the date of the

judgment of the Supreme Court or such other amount as the Court shall see fit.

18. Two grounds of appeal were submitted on behalf of the appellant. They were:

(1) There was no wrongful dismissal;

(2) If there was a wrongful dismissal, the judge erred in considering the number of months' salary that should be awarded in lieu of notice.

19. Mr. Tucker for the appellant submitted that the learned trial judge, having found that the respondent had been dishonest, he was in error in finding that this did not amount to gross misconduct.

20. In the respondent's Letter of Appointment, Clause 9(c) states:

> "The Board may dismiss the employee if (i) at any time the employee neglects or refuses for any cause (except ill-health not caused by the employee's own misconduct) to perform the contractual duties, or (ii) the employee refuses to comply with the lawful instructions and/or directions given by the Board through its duly authorized officers, or (iii) the employee's behaviour in any manner is deemed as "gross misconduct". In such dismissal all the employee's rights and advantages reserved by this Agreement shall cease."

21. Clause 9(d) provides for the employer terminating her employment by (i) giving the employee 1 months' notice or (ii) paying the Board the equivalent of 1 months' notice salary in lieu of such notice. No provision is made in the letter of appointment for the employer's period of notice to dismiss the employee.

22. It will be useful to look at provisions of the policy and procedures as it relates to the Code of Conduct of the Bermuda Hospitals Board. There is a long list of violations and breaches, but they all relate to the actions and performance of the employee in matters relating to the Boards' business. It states that violations of the provisions of the policy or any other Bermuda Hospitals Board policy will

result in disciplinary action. Discipline will be based on the type of policy violations. It is clear that termination will be based on the most serious violations.

23. In the policy and procedures dated August 2004 relating to disciplinary action, the rationale is stated thus:

> "The Board aims to ensure that there will be a fair and systematic approach to the use of disciplinary procedures for all employees. It is the Board's purpose to correct and rehabilitate negative actions and performance wherever possible. Discipline is a corrective process implemented to improve performance wherever possible. Discipline is a corrective process implemented to improve performance and should not be used simply as a punitive measure. We are reminded that employees as well as arbitrators consider termination/firing the Capital Punishment of labour relations." (my emphases)

24. Penalty guidelines setting out the type of delinquency and the suggested disciplinary action in relation to a first offence, a second offence, and a third offence are set out in a policy document attached as Appendix A.

25. The investigation commenced as an inquiry as to whether the respondent had called the school. Later the investigation related to whether the respondent had lied about calling the school. On June 13, 2011 the respondent was supplied with a copy of the written complaint. At the end of this meeting the respondent was told that she will remain suspended until the investigation was complete. It appears that the next meeting took place on June 30, 2011 when the respondent was handed the disciplinary action form and informed of the termination of her contract of employment. It can be inferred that no further investigation had taken place after June 13, 2011. The respondent was entitled to have been given an opportunity to put her case at a continued investigation. The issue is whether the

investigation would have been completed by June 30, 2011 and how long after this date it would have taken the appellant to complete the investigation. This matter will be referred to later when the Court considers the respondents notice as to damages. The lie was related to another co-worker and was not done in relation to the business of the appellant. That is not to say that the appellant should not have investigated the matter.

26. When reading the policy and procedures and the Code of Conduct of the appellant it is clear that the concern is as to breaches relating to the business of the appellant. The lie here does not relate to the business of the appellant. Even if it did, it cannot be said to be one of the serious breaches under the Code. In fact, the appellant in ticking the "others" box must mean that it had difficulty in identifying any of the breaches listed in the Code of Conduct. By no stretch of the imagination could a lie be regarded as the "capital punishment of labour relations", requiring dismissal. It is interesting to note that the breach of proven dishonesty is listed with theft or attempted theft. This would indicate a closeness to an alleged criminal offence.

27. It could not be said that telling a lie in the circumstances of this case is such a breach to be regarded as a serious breach and still yet to reach the pinnacle of gross misconduct. We find that Hellman, J was not in error in his conclusion that the lie did not amount to gross misconduct. There was therefore a wrongful dismissal.

28. There was no cross appeal as to the damages awarded in relation to the period of notice required and that head of damages is affirmed.

Respondent's Cross Appeal

29. An employer is required to follow the requirements of a disciplinary policy before terminating an employee. Mr. Sanderson for the respondent submitted that the appellant failed to comply with the disciplinary procedures in her contract of employment as it did not give her the opportunity to explain her lies before dismissing her. At trial the appellant admitted that it did not give her this opportunity but maintained that it had no contractual obligation to do so because the respondent was terminated on the ground of gross misconduct.

30. The respondent was not told that she was being investigated for dishonesty until June 30, 2011, the date of her termination. Prior to that she was being investigated for calling the school.

31. If the investigation for dishonesty had commenced on June 30, 2011, it is reasonable to say that it would have taken at least one month for its conclusion. The respondent however submits that it would have taken about two months and that she is entitled to an additional two months' salary, as the notice period would not have commenced before until after two months after June 30, 2011. *Gunton v London Borough of Richmond upon Thames* [1980] 3 All ER 577.

32. In the circumstances the Court is satisfied that one month would have been sufficient time to complete the investigation and that she was entitled to one months' salary in addition to the three month's salary awarded at trial for wrongful dismissal. The additional month salary would be $4,659.30 and part time earnings of about $2,000 making a total of $6,659.30.

Health Insurance

33. The respondent had surgery on one eye in May 2011. This was covered by her health insurance. Surgery for her other eye took place in December 2011 at a cost of $25,871.84. By this time her employment had been terminated and she was no longer covered by insurance.

34. Mr. Sanderson submitted that the trial judge was in error in his calculation of her loss of health insurance by prorating the respondent's health insurance cost. He also argued that the correct award should have been the cost of the eye surgery which was $25,871.84.

35. As a result of her wrongful dismissal, the insurance policy would have come to an end 28 days after June 30, 2011.

36. In a written statement dated January 13, 2013, the respondent states:

> "I was fired without notice and this was a very big setback for me. The hospital did not give me any directions or information on tying up loose ends. I lost the opportunity to continue my existing health insurance with Argus. This meant that I could only obtain HIP coverage. I am diabetic and have had to have had major eye surgery. I flew out to Boston in April and May 2011, while covered by Argus, for surgery on my left eye. I was then supposed to go back and have surgery on my right eye. However, because I was fired and lost by insurance cover, I was unable to finance this. I had to try and organize financing.....The costs amounted to $25.871.84. I am supposed to have further eye surgery in Boston next month and am having to draw down on my pension for this."

37. The respondent's statement that she was supposed to go back and have surgery on her right eye was sufficient to put the appellant on notice that if they wished to allege that it would not have been performed during the period when she would have been covered by insurance they had to call evidence to that effect.

38. We find that the respondent's inability to have the eye surgery earlier than December was due to the wrongful dismissal of the respondent. The appellant should therefore bear the cost of the eye surgery.

39. The trial judge was in error in not awarding her $25,871.84 for the cost of the eye surgery. This figure should have been added to the damages awarded by the judge.

Stigma Damages

40. Mr. Sanderson submitted that Hellman, J was wrong to hold that until "Addis" is reversed, it remains the law that stigma damages cannot be recovered for wrongful dismissal (*Edwards v Chesterfield Roya Hospital NHS Foundation Trust* [2012] 2 AC 22 at paragraph 85). The respondent was claiming damages on the basis that her wrongful dismissal, and the reasons given for her dismissal, dishonesty amounting to gross misconduct, had made it much more difficult to find another job.

41. Although Hellman J had ruled that the respondent was not entitled to damages under this head, he appears to have taken into account in arriving at the three months' notice, the prospects of difficulty for the respondent getting a new job.

42. At paragraph 65 of his judgment he stated:

> "I therefore take one months' notice as a starting point. However, Bermuda is not Canada and any adjustment to this period will be modest not straying too far from custom and practice in the labour market. The Plaintiff is in poor health and Bermuda is in the midst of a serious recession. In the circumstances I find that a reasonable notice period would have been three months."

43. The effect of this is that the respondent was awarded one month's notice and two months' additional notice having regard to the prospects of getting a new job. She was therefore compensated for her difficulty in finding a job.

44. The trial judge was not in error in not awarding stigma damages.

45. The appeal is dismissed and on the cross-appeal the damages awarded is varied to $53,069.89 made up as follows:

    (1) 3 months' Loss of Earnings: $20,538.75

    (2) Further Loss of Earnings under the *Gunton* principle: $6,659.30

    (3) Health Insurance: $25,871.84

Signed

Zacca, P

Signed

Baker, JA

Auld, JA

1. I agree with the President that that the appeal should be dismissed and that the Respondent's cross-appeal should be allowed part so as to vary the total of the award to the Appellant to $53,069.89, made up as he has indicated. In doing so, I have had some hesitation whether the *Addis v Gramaphone Co. Ltd.* [1909] AC HL 488 principle of irrecoverability of damages for humiliation or stigma for the manner of wrongful dismissal applies to a claim today of this sort for difficulty in finding other employment. However, the matter was barely argued by counsel and over-all justice to the Respondent's other claims touching on the same point have, I believe, been achieved.

2. I have had some difficulty with the health insurance point, but believe that, the issue having been raised by the Respondent and not dealt with by the Appellants, the award under that head achieves a broad justice between the parties as part of the over-all award substituted by this Court for that made by the Judge.

Signed

Auld, JA

Appendix A

As referred to in Paragraph 24 of the Judgment

Bermuda Hospitals Board CARING FOR OUR COMMUNITY	POLICY & PROCEDURES # 5.1	SECTION HUMAN RESOURCES	PAGES 6	NUMBER 6 of 7
SUBJECT DISCIPLINARY ACTION	DATE AUG 2004	ISSUING AUTHORITY HUMAN RESOURCES		
SUPERSEDES DISCIPLINARY ACTION – MAR. 1992, 2001	CROSS REF.	APPROVED BY: HOSPITAL MANAGEMENT TEAM		

PENALTY GUIDELINES CONTINUED

TYPE OF DELINQUENCY	FIRST OFFENCE	SECOND OFFENCE	CONTINUES OFFENCE
Sleeping on duty: a) Where safety of persons or property is not endangered. b) Where safety of persons or property is endangered	Counselling Verbal warning Written warning Written warning Suspension or Termination (Depending upon circumstances)	Written warning Suspension Termination	Suspension Termination
Neglect of duties: Loafing, neglecting tasks assigned, unreasonable delay in carrying out instructions, conducting personal affairs on official time.	Verbal reprimand Written warning	Written warning Suspension	Suspension Termination
Reporting to duty or being on duty under the influence of intoxicants, including drugs, in chronic cases medical referral to therapy.	Suspension Termination	Suspension Termination	Termination
Consuming or possession of intoxicants, including drugs on the premises.	Suspension Termination	Termination	
Misuse of sick days, No proof of chronic problem.	Written warning Counselling	Written warning Suspension	Suspension Termination
Falsification of any official document(s) or record(s) or concealment of material fact by omission from official documents or records (i.e. punching in or out for fellow employees, false declaration on application or medical certificates etc.)	Suspension Termination	Termination	
Proven dishonesty, theft or attempted theft. Unauthorized	Suspension Termination	Termination	

removal of hospital property.			

Bermuda Hospitals Board CARING FOR OUR COMMUNITY	POLICY & PROCEDURES # 5.1	SECTION HUMAN RESOURCES	PAGES 7	NUMBER 7 of 7

SUBJECT DISCIPLINARY ACTION	DATE AUG 2004	ISSUING AUTHORITY HUMAN RESOURCES
SUPERSEDES DISCIPLINARY ACTION – MAR. 1992, 2001	CROSS REF.	APPROVED BY: HOSPITAL MANAGEMENT TEAM

PENALTY GUIDELINES CONTINUED

Proven verbal abuse of another employee, a patient or visitor.	Written warning Suspension	Suspension Termination	Termination
Proven physical abuse of another employee, a patient or visitor.	Suspension Termination	Termination	
Disclosure of confidential information without authorization.	Suspension Termination	Termination	