In The Supreme Court of Bermuda

CIVIL JURISDICTION

2014: No 89

BETWEEN:-

CURTIS PEADEL RICHARDSON

Plaintiff

-and-

AIR CARE LIMITED

Defendant

JUDGMENT

(In Court)

Date of hearing: 3rd and 4th December 2014
Date of judgment: 14th January 2015

The Plaintiff in person
Mr Craig Rothwell, Cox Hallett Wilkinson Limited, for the Defendant

Introduction

1. By a writ of summons dated 6th March 2014 the Plaintiff claims damages against the Defendant for wrongful dismissal and unlawful discrimination contrary to the Human Rights Act 1981 ("the HRA"). He was dismissed for

continued lateness. The Plaintiff contends that his contractual start time was 8.00 am, to which he by and large adhered, whereas the Defendant contends that it was 7.30 am. There is also a dispute about whether, in dismissing the Plaintiff, the Defendant complied with its contractual disciplinary procedure. The HRA complaint concerns allegations that the Plaintiff was fired in order to provide employment for two Canadian expatriate workers.

Background

2. The Defendant was sub-contracted to install the building automation system ("BAS") in the new hospital wing at the King Edward VII Memorial Hospital ("the Hospital"). Installation work began in or around October 2012.

3. The Defendant hired three Bermudians with no previous knowledge or experience in this area to help with the installation. They were to be trained on the job. One of those three was the Plaintiff. He was taken on as a BAS technician.

4. The lead contractors were Black & MacDonald and BCM McAlpine. They had stipulated that the start time for sub-contractors was 7.30 am. I was referred to an email dated 3rd September 2012 from Black & MacDonald reminding their sub-contractors that this was the start time.

5. The Plaintiff was interviewed for the job by his prospective manager, Matt Walker. It is common ground that Mr Walker's management style could fairly be described as robust, but I see this as no cause for criticism. The interview took place on 2nd October 2012. Mr Walker gave evidence that he told the Plaintiff that the hours of work would be 7.30 am to 4.00 pm Monday to Friday. The Plaintiff disputes this.

6. At the conclusion of the interview the Plaintiff was handed a written statement of employment by Kristal Whitehurst, the Defendant's Human

Resource Office Supervisor, which he signed, and was given a copy of the booklet "*Staff Guidelines and Collective Agreements*" ("the Guidelines").

7. A written statement of employment is a document which an employer is required to issue to an employee pursuant to section 6(1) of the Employment Act 2000 ("the 2000 Act"). This provides that not later than one week after an employee begins employment, the employer shall give to the employee a written statement of employment which shall be signed and dated by the employer and employee. The statement is required by section 6(2) of the 2000 Act to contain various particulars, of which the most pertinent for the purposes of this hearing are: (i) the normal days and hours of employment and (ii) any disciplinary procedures applicable. It may also contain details other than those which it is required to contain relating to the terms and conditions of employment.

8. Thus a written statement of employment is not itself the contract of employment but sets out certain important terms of the employment contract. It is therefore important that the statement is drawn up accurately. As evidence of the terms of the employment contract it is strong but not necessarily conclusive.

9. Section 6(5) of the 2000 Act provides that where the employer and employee agree to change any of the terms of employment the employer shall, as soon as practicable, and no later than one month after the change is agreed, give to the employee an amendment to the statement containing particulars of the change or a revised statement which shall (in either case) be signed and dated by the employer and employee. It is common ground that the Defendant did not give the Plaintiff any such amendment or revised statement.

10. Ms Whitehurst, who prepared the Plaintiff's statement of employment, said in evidence that it was based on a pro forma statement which had been in place for seven years. She added that she would have expected Mr Walker

to inform her of any changes to the terms set out in the standard document but that he did not do so.

11. Under the heading "*Work Hours*", the Plaintiff's statement of employment provided:

> Your working hours will be from 8:00 a.m. to 5:00 p.m., Monday through Friday at the offices of Air Care.

12. Under the heading "*Termination of Employment*", the Plaintiff's statement of employment provided:

> **a) Termination for Unsatisfactory Performance**
>
> Duties not performed in a satisfactory manner may result in disciplinary measures taken, including the following: -
>
> - A written warning may be given, with instructions as to how to improve performance.
>
> - If, during the period of six months beginning with the date of the written warning, there continues to be duties that are not being performed in a satisfactory manner, the employee may be terminated without notice or payment of any severance allowance.
>
> **b) Termination for Repeated Misconduct**
>
> Misconduct that is directly related to the employment relationship may result in disciplinary measures. For instance –
>
> - A written warning may be given.
>
> - Furthermore, if during the period of six months beginning with the date of the written warning, there is again misconduct with respect to the employment relationship, the employee may be terminated without notice or payment of any severance allowance.
>
> **c) Dismissal**
>
> Employment may be terminated in connection with: -

- Your ability, performance or conduct; or
- The operational requirements of Air Care Ltd.

One month written notice of termination will be given in these circumstances.

In lieu of providing notice of termination of employment, Air Care Ltd. may pay a sum equal to remuneration and benefits that would have been due up to the expiry of the required notice period.

d) Summary Dismissal for Serious Misconduct

Summary dismissal will occur, without notice or payment of severance allowance, for serious misconduct which: -

- Is directly related to the employment relationship; or
- Has a detrimental effect on Air Care's operating effectiveness and efficiency.

13. Those provisions are based respectively upon sections 27, 26, 18 and 25 of the 2000 Act.

14. The Guidelines, under the heading "*Disciplinary Procedures*", addressed the procedures which could culminate in dismissal. Although I was referred to the November 2013 edition of the Guidelines, it was common ground that the relevant provisions were the same as in the edition which was in force during the Plaintiff's employment with the Defendant. Those provisions were as follows:

> Employees are expected to abide by the procedures, rules and regulations of the Company. Failure to do so could result in disciplinary action being taken. Depending upon the nature of the infraction and after a full investigation of the circumstances, one or more of the following may result:
>
> <u>Stage I – Verbal Warning</u>
> This will be given verbally to the individual concerned by his immediate supervisor to clarify and specify the improvement required.

Stage II 1st Written Warning

The Supervisor/Manager will warn the individual concerned in the presence of his/her representative pointing out the fault of misconduct and indicating that there must be an improvement within a specified time. Failure to make the necessary improvements will result in Stage III. This warning will be confirmed in writing and entered on the employee's personal file for a period of twelve (12) months.

Stage III – 2nd Written Warning

The Supervisor/Manager will warn the individual concerned in the presence of his/her representative. A final written warning stating that failure to make the requirement (sic) improvements within a specified time will lead to disciplinary action being taken.

A copy of this written warning will be entered on the employee's personnel file for a period of 12 months.

Stage IV – Suspension or Dismissal

In the event that the required improvement is not forthcoming the necessary action may be taken. This will be communicated to the individual concerned by the Supervisor/Manager in the presence of his/her representative.

The employee has a right to appeal in writing any dismissal in accordance with the employee grievance procedure within 3 working days. This must be submitted to the Human Resources Department.

15. The disciplinary procedures set out in the Guidelines follow those set out in the Collective Agreement between the Defendant and the Bermuda Industrial Union for the period 2013 – 2015 ("the Collective Agreement"). The Collective Agreement was dated 10th June 2013. I was not told whether this followed on from an earlier collective agreement. It was in any event in force when the Plaintiff was dismissed. One of the issues in this case is whether the disciplinary procedures in the Guidelines and the Collective Agreement formed part of the Plaintiff's contract of employment.

16. The Plaintiff commenced employment with the Defendant on 4th October 2012. Mr Walker gave evidence, which is disputed by the Plaintiff, that at a safety meeting briefing during that month he made clear to all of the Defendant's employees working on site, which I took to include the Defendant, that the start time was 7.30 am.

17. The Plaintiff completed his three month probationary period without incident. From this I infer that he was aware that he was expected to start work at 7.30 am and that during his probationary period he did so. The Plaintiff, however, contends that insofar as he did start work at 7.30 am it was a voluntary concession to accommodate the Defendant and that, throughout the period of his employment, his contractual start time remained 8.00 am.

18. It is common ground that a 7.30 am start time was mentioned between the Plaintiff and Mr Walker on several occasions. Mr Walker gave evidence that in 2012 the Plaintiff mentioned that he did not have transportation and was trying to find a motorbike but does not accept that the Plaintiff said that he could not make 7.30 am. His view was that the Plaintiff's transportation was not the Defendant's problem.

19. The Plaintiff gave evidence of two incidents which he said took place in the first quarter of 2013. In the first incident, he told Mr Walker that the word around the site was that there was a 7.30 am start time, but that this would be problematic for him. He said that Mr Walker didn't respond. The Plaintiff said that in the second incident Mr Walker asked him if he could make a 7.30 am start time. He replied that this was a problem but that he would do his best.

20. In June 2013 the Plaintiff and another employee, Kai Edwards, approached Mr Walker about the 7.30 am start time. Mr Walker gave evidence that they said that they didn't like the 7.30 am start time and asked whether they could start at 8.00 am: he said that they couldn't and they went away. When cross-

examined, he did not agree that the Plaintiff and Mr Edwards were not accepting that the start time was 7.30 am.

21. The Plaintiff lived in Sandys and through most of his employment was reliant upon his wife, who was also employed, to drive him to work in the family car. They had an infant daughter, whom they dropped off at daycare in Warwick en route to work, but this did not open until 7.30 am. The Plaintiff stated that that was why for the most part he would report to work at 7.45 am.

22. It is common ground that the Plaintiff had applied to the Defendant's financial controller for a personal loan from the company to buy a motorbike, but this had not been forthcoming. The Plaintiff maintained that he had applied for a loan so that he could more easily get to work by 7.30 am. However the Defendant's financial controller, Shawnette McLarty, gave evidence that the Plaintiff had told her that he needed a loan because the lead contractors were reducing the number of vehicles that were permitted to park at the site.

23. The Plaintiff, when cross-examined, accepted that he lived just a minute or two from the nearest bus stop and that he could easily have caught a bus in to work. However he said that he never thought of coming in by bus because he never felt the need to.

24. Mr Walker gave evidence that, in common with everyone else working on site, the Defendant's employees were issued with swipe cards and required to swipe in or swipe out every time they entered or left the premises. He stated that on several occasions he made clear to the Defendant's workforce, including the Plaintiff, that they must do this.

25. This requirement was imposed by the lead contractors. Initially it was so that they knew who was on site in case of emergency. But later they used it to keep track of the overtime payable to the various sub-contractors. Beginning in around April 2013, the lead contractors would from time to time make relevant portions of the swipe card records available to the sub-

contractors. This was typically when, according to those records, there had been flagrant breaches of timekeeping by the various sub-contractors' employees.

26. The Defendant maintained a manual record of its employees' hours of attendance on site. This was known as a "*plant return form*". It was common ground that responsibility for compiling this record alternated between the Plaintiff and one or more of the Defendant's other employees. The Plaintiff gave evidence that he used to compile the plant return form, which he stated took about half an hour, before swiping in. He said that he swiped the card when it was convenient for him. Thus he maintained that the swipe card records were not an accurate record of his presence on site. Mr Walker accepted that in common with other employees the Plaintiff would often forget to swipe.

27. Mr Walker went away on holiday during the first two weeks of July 2013. That is when matters came to a head. He received an email from Black & McDonald on 13th July 2013 complaining about the time keeping of the Defendant's employees. He received similar complaints from Brownlow Adderley, one of the Plaintiff's co-workers, whom he had appointed as temporary foreman.

28. Mr Walker was moved to send an email to the Plaintiff and Mr Edwards, also on 13th July 2013, "reading the Riot Act" to them:

> I am extremely disappointed in what I am hearing (while on vacation, no less) about the behaviour of the crew – taking long breaks, hour lunches, and sitting in plain sight of Black and Mac while doing this. I am hearing this from multiple sources, so I have to believe what I am hearing. …
>
> The work day is from 7:30 to 4 … I will be verifying the swipe log weekly …

> Air Care will not tolerate this type of work ethic. If this continues, the offending party will be suspended without pay, and then terminated should there be further issues.

29. The Plaintiff gave evidence that, notwithstanding that the email was addressed, among others, to him, he did not believe that it was intended to apply to him as his contract stated that his start time was 8.00 am.

30. Mr Adderley gave evidence that, after speaking to Mr Walker, he called a meeting of the Defendant's employees on site, including the Plaintiff, at which he stressed the importance of punctuality and told them that if they were not there at 7.30 am they would start work at 8.00 am and that half an hour's pay would be deducted. He said that the Plaintiff replied that he had a family and couldn't make 7.30 am. Mr Adderley said he told the Plaintiff that the Plaintiff would have to take that up with Mr Walker as he, Mr Adderley, was following instructions that there were to be no exceptions.

31. That meeting took place on 14th July 2013. The very next morning, the Plaintiff arrived late, although not very late. The swipe card records show that he swiped in at 7.32 am. There may have been an interval between the time at which he swiped in and the time that he arrived at his work area, as he would have had to make his way from the entrance to get there. Nonetheless, Mr Adderley, who would not have had access to the swipe card records for that day, told him that he would have to sit down until 8.00 am.

32. The Plaintiff left the site. His evidence was that Mr Adderley told him to leave: Mr Adderley's evidence is that he left of his own volition. Either way, the Plaintiff went directly to the office of Robert Platt, the general manager of the Defendant, and complained about the deduction of 30 minutes pay. Mr Platt, who gave evidence that he was unaware of the background to the matter, assured the Plaintiff that he would not lose 30 minutes pay and asked him to return to work.

33. When Mr Walker returned to work he issued the Plaintiff with two pro forma written warnings. They are both dated 18th July 2013. Mr Walker's

evidence is that he did so after consulting with the Human Resources Department "*every step of the way*". However Ms Whitehurst gave evidence, which I accept, that she was merely notified of the written warnings and did not have input into the decision. Both warnings were signed by Mr Walker and Ms Whitehurst.

34. The first warning gave the "*date of occurrence*" as June 24th – 28th. The box labelled "*first written warning*" was checked. The reasons for the warning were given as "*continued lateness or absenteeism*" and "*failure to comply with site rules*". The remarks by the supervisor were: "*Consistently late/ failure to swipe in and out at KEMH time card swipe as per site rules*".

35. The second warning gave the "*date of occurrence*" as July 2nd, 3rd and 4th. The box labelled "*second written warning*" was checked. The reasons for the warning were given as "*continued lateness or absenteeism*", "*dishonesty or stealing*", and "*failure to comply with site rules*". The remarks by the supervisor were: "*30 minutes late July 2, 3, 4th/ time reported inaccurately July 2, 3, 4th/ failure to swipe in and out at KEMH time card swipe as per site rules.*"

36. Mr Walker explained that the allegation of "*dishonesty or stealing*" related to the Plaintiff allegedly claiming for eight hours work on days when he had done less than eight hours work. He gave evidence that the Plaintiff had been given the opportunity to amend his timesheet to reflect the correct hours worked, as had two other employees with respect to their timesheets, but that unlike them the Plaintiff had declined to do so. The Plaintiff gave evidence denying both the allegation and that he had been given an opportunity to amend the timesheet.

37. This is not a claim for unfair dismissal. If it were, the absence of a disciplinary hearing or even an informal opportunity for the Plaintiff to respond to these allegations before either warning was given would be highly relevant.

38. The Plaintiff did not accept that he had done anything wrong. He wrote a letter to Ms Whitehurst, also dated 18th July 2013, in which he disputed the allegations and explained that he would arrive on site, complete the plant return form, and then swipe in.

> My swipe would normally happen at around 8:00 am having begun the task at 7:30am each day. …
>
> There is flawed evidence that I had swiped my card at times past the regulated 7:30 am start time of the normal workday. It is my contention that I was on site within the confines of the regulated time of those workdays performing a duty that I have since Monday, July 15, 2013, passed on to the site foreman in his supervisory position.

39. Significantly, the Plaintiff did not state in the letter that he did not have to be on site until 8.00 am because that was his contractual start time. Neither did he state that he was unable to make the 7.30 start time. When cross-examined about this he said that he didn't state that his start time was 8:00 am because he had already told Mr Walker that on numerous occasions and that the letter was addressed to Ms Whitehurst, who already knew. He said that he didn't mention his difficulties in making a 7.30 am start time because the purpose of the letter was to address the allegations made in the written warnings.

40. The Plaintiff arrived at work by 7.30 am for the rest of July 2013. However in August 2013 he swiped in after 7.30 am on nine occasions. In September 2013, up to and including 13th September, he swiped in after 7.30 am on six occasions. Save for one occasion in August, he was always on site by 8.00 am, and usually by 7.45 am.

41. Mr Walker gave evidence that on 13th September 2013, following complaints of lateness from the new foreman, he held a meeting with the Plaintiff at which he raised this and other concerns and warned the Plaintiff that if he failed to change his ways he would be dismissed. The Plaintiff did not accept that the meeting took place. He stated in evidence that at no time was he ever told that if he did not make a 7.30 am start time he would be

dismissed. But Mr Walker stated that he remembered the meeting very clearly.

42. For the next three working days, which fell on the 16th through 18th September 2013, the Plaintiff swiped in before 7.30 am. He took the next four working days off. He returned to work on 25th September 2013, when he swiped in at 7.31 am. On 26th, 27th and 30th September 2013, his swipe in times were 7.38, 7.46 and 7.44 am.

43. That was the last straw for Mr Walker. Following the Plaintiff's arrival after 7.30 am on 27th September 2013, Mr Walker had asked Ms Whitehurst to prepare a "third" written warning. But that was never issued. In light of the Plaintiff's arrival after 7.30 am on 30th September 2013, Mr Walker decided to dismiss him instead. At Mr Walker's request, Ms Whitehurst prepared a letter of dismissal, which he reviewed, and she then signed. It was dated 30th September 2013. The letter read as follows:

> After several warnings and discussions with you about being late, you continue to do so; with today, September 30th being the most recent. We cannot continue to except (sic) this behaviour, especially on the KEMH jobsite, as it looks very bad and makes us look extremely unreliable as a company.
>
> Therefore, this letter is to confirm that your employment with Air Care Limited has been **terminated**, effective today, September 30, 2013.
>
> The reason for your dismissal is:
>
> - **Continued Lateness**
>
> You will receive your final pay check on Wednesday, October 2nd 3013. Please arrange to return any company property that is in your possession.
>
> Although we regret this situation, this act is compulsory and necessary. We wish you all the best in your future employment endeavors.

44. Mr Walker called a meeting that morning at the Defendant's offices. He gave evidence that he handed the Plaintiff the letter and asked that he excuse

himself from the meeting. He said that the Plaintiff left without saying a word.

45. Ms Whitehurst, when cross-examined, gave evidence that the Plaintiff's dismissal was not carried out in accordance with the Guidelines. She stated that the normal practice would have been to issue an oral warning, then two written warnings, which I took to mean written warnings on two separate occasions, followed in a case, such as this, of repeated rather than serious misconduct, by a letter of suspension rather than dismissal.

46. The Plaintiff did not take his dismissal lying down. On 1st October 2013 he sent an email to Mr Walker, which he copied to Ms Whitehurst and Mr Platt, in which he stated that he had told Mr Walker on numerous occasions that he could not guarantee to make 7.30 am due to his shared single family vehicle, and that he had asked if he could make 8.00 am to 4.30 pm. But he did not allege that his contractual start time was 8.00 am.

47. On 2nd October 2013 the Plaintiff sent a further email to Mr Platt in which, for the first time, he alleged that his "*employment contract*" stated that his working hours were 8.00 am to 5.00 pm, not 7.30 am to 4.00 pm.

Discussion

48. The Plaintiff was dismissed for continued lateness. I take "continued" to mean "persistent". A convenient way to determine whether that dismissal was wrongful is to address the following questions:

    (1) Was the Plaintiff persistently late for work?

    (2) If so, was the Plaintiff's persistent lateness in principle sufficient to justify his dismissal for cause under his contract of employment?

    (3) If so, was the Plaintiff's dismissal in accordance with the disciplinary procedure under his contract of employment?

Was the Plaintiff persistently late for work?

49. To answer this question, it is necessary to establish the Plaintiff's contractual start-time. He was hired to work on the Hospital site. I am therefore satisfied that it was an implied term of his contract of employment that his start time would be the same as the general start time on the site, and that that start time was 7.30 am. In other words, I am satisfied that a 7.30 am start time is to be implied from the contract when construed as a whole against the relevant background. See AG of Belize v Belize Telecom Ltd [2009] 1 WLR 1988, PC, *per* Lord Hoffmann at para 21. It follows that I am satisfied that the Plaintiff's statement of employment does not accurately state his contractual hours of work.

50. I am also satisfied that at all material times the Plaintiff knew perfectly well that his contract of employment required him to start work at 7.30 am. This is evidenced by the fact that he did start work regularly at 7.30 am during his probationary period. It is also evidenced by the fact that his letter of 18th July 2013 makes no mention of a contractual start time of 8.00 am. It is inconceivable that if he really believed that that was his contractual start time he would not have mentioned it in that letter. Indeed the Plaintiff did not assert an 8.00 am start time in writing – or, I am satisfied, at all – until his email of 2nd October 2013, which was sent after he was dismissed.

51. Whereas I accept that the Plaintiff found a 7.30 am start time inconvenient, I do not accept that he found it impossible. This is evidenced by the fact that he did manage to start work at 7.30 am during his probationary period and sporadically throughout the term of his employment. If, as he said, he had difficulties getting in to work by 7.30 am by car, I find it astonishing that he did not investigate the possibility of using public transport: as noted above, he could easily have caught a bus in to work.

52. I did not find the Plaintiff a convincing witness, and where his evidence conflicted with that of the Defendant's witnesses, I preferred the evidence of the latter. To give but one example, the Plaintiff alleged in his witness

statement that due to the allegedly poor quality of the air on site – as to which I am not in a position to make any finding – he was forced to use twelve vacation days for sick leave. However, when cross-examined with reference to a schedule of the vacation days which he had in fact taken, he admitted when pressed that sickness due to allegedly poor air quality did not account for any of them.

53. The Plaintiff is not without talent. He has a Bachelor of Fine Arts degree in Architectural Design and, although unrepresented before me, conducted his case with conspicuous economy and skill. I hope that he will reflect upon his unhappy experience with the Defendant: it would be a shame if the cavalier attitude towards punctuality which destroyed this career opportunity were to destroy any future opportunities which may come his way.

54. I am satisfied from the swipe card records, the plant return forms, and the Plaintiff's evidence, that following the completion of his probationary period the Plaintiff frequently started work after 7.30 am, and that he continued to do so after receipt of his first written warning. I am therefore satisfied that the Plaintiff was persistently late for work.

Was the Plaintiff's persistent lateness in principle sufficient to justify his dismissal for cause under his contract of employment?

55. The Plaintiff's statement of employment provided that his employment could be terminated *inter alia* for unsatisfactory performance, repeated misconduct, or serious misconduct.

56. Mr Rothwell, who represented the Defendant with his customary ability, referred me to a number of authorities on point. In JR Phillips v Glendale Cabinet Co Ltd [1977] IRLR 307 at para 5 the Employment Appeal Tribunal held that on the facts of the case an employee's persistent lateness breached a fundamental term of his employment contract, thereby repudiating the contract, which the employer would have been entitled to accept as a

repudiation so as to bring the contract to an end. In fact, the employer merely demoted the employee.

57. In Laws v London Chronicle, Ltd [1959] 1 WLR 698, Lord Evershed MR, giving the judgment of the Court of Appeal of England and Wales, stated at 287 E – F (although I am using more modern terminology) that summary dismissal, ie dismissal without notice, will be justifiable where the conduct complained of is such as to show that the employee has disregarded the essential conditions of the employment contract.

58. I was referred to an extract from a Canadian textbook, Wrongful Dismissal and Employment Law[1], to similar effect:

> While any unauthorized absence from work or tardiness is, strictly speaking, a breach of the employment contract, to constitute "just cause" for summary dismissal, the absenteeism or lateness must be sufficiently serious that it meets the general requirements for cause, i.e., it "amounts to misconduct that is incompatible with the fundamental terms of the employment relationship": Whitford v. Agrium Inc., 2006 ABQB 726 (CanLII), [2006] A.J. No. 1235 (QL), 53 C.C.E.L. (3d) 272 (Q.B.), at para. 30; Rutkowski v. Edmonton Transit Mix & Supply Co. Ltd., 2007 ABQB 277 (CanLII), [2007] A.J. No. 1197 (QL) (Q.B.), at para. 90[.]

59. As the Plaintiff well knew, it was an important requirement of his job that he turn up to work on time. I am satisfied that his persistent lateness was in principle sufficient to justify his dismissal for cause under his contract of employment, whether for misconduct or unsatisfactory performance.

Was the Plaintiff's dismissal in accordance with the disciplinary procedure under his contract of employment?

60. An employee cannot lawfully be dismissed on disciplinary grounds, eg for misconduct, until the disciplinary procedure prescribed by his contract of

[1] Neumann and Sack, Lancaster House, 1st Edition, etext, updated 2014-10-29.

employment has been carried out. See Gunton v Richmond-upon-Thames [1981] 1 Ch D 448, EWCA, *per* Buckley LJ at 462 B – C and Brightman LJ at 473 H – 474 A. The decision was cited with approval by the Court of Appeal in Bermuda Hospitals Board v Woods-Forde [2013] CA (BDA) 17 Civ in the majority judgment given by Zacca P at paras 31 – 32.

61. It is common ground that the Plaintiff was dismissed for misconduct. In order to determine whether he was dismissed in accordance with his contractual disciplinary procedure it is necessary to establish what that procedure was.

62. The point of contention is whether, as the Plaintiff submits, the disciplinary procedures set out in the Guidelines and the Collective Agreement were incorporated into his contract of employment. As Hobhouse J (as he then was) stated in Alexander v Standard Telephones and Cables Ltd (No 2) [1991] IRLR 286 at para 31:

> Where it is not a case of express incorporation, but a matter of inferring the contractual intent, the character of the document and the relevant part of it and whether it is apt to form part of the individual contract is central to the decision whether or not the inference should be drawn.

This passage was applied in Kaur v MG Rover Group Ltd [2005] IRLR 40, EWCA at paras 31 and 32, and Keeley v Fosroc International Ltd [2006] EWCA Civ 1277 at paras 32 and 33.

63. Subsequent case law, to which I was helpfully referred by Mr Rothwell, has fleshed out the kind of factors which the court will take into account when determining whether a provision has been incorporated. Eg in Hussain v Surrey and Sussex Healthcare NHS Trust [2011] EWHC 1670 (QB) Andrew Smith J held at para 168 that there is no single test as to whether an employer and employee have agreed that some or all of the provisions of a document are intended to be contractual. However he stated that factors tending to indicate that they are so intended may include:

i) The importance of the provision to the contractual working relationship between the employer and the employee and its relationship to the contractual arrangements between them: … the more important the provision to the structure of the procedures, the more likely it is that the parties intended it to be contractual. As Auld LJ said in Keeley v Fosroc International Ltd, [2006] IRLR 961 (which concerned whether provisions relating to enhanced redundancy payments in a Staff Handbook were enforceable as part of individual contracts of employment), "*Highly relevant in any consideration, contextual or otherwise, of an "incorporated" provision in an employment contract, is the importance of the provision to the over-all bargain, here, the employee's remuneration package – what he undertook to work for. A provision of that sort, even if couched in terms of information or explanation, or expressed in discretionary terms, may still be apt for construction as a terms of his contract ....*" (at para 34).

ii) The level of detail prescribed by the provision: as Penry-Davey J said in Kulkarni v Milton Keynes Hospital NHS Trust, [2008] IRLR 949 at para 25, the courts should not "*become involved in the micro-management of conduct hearings*", and the parties to the contract of employment are not to be taken to have intended that they should be. (In the Court of Appeal in Kulkarni , (loc cit) at para 22, Smith LJ endorsed this observation of Penry-Davis J.)

iii) The certainty of what the provision requires: as Swift J observed (in Hameed (loc cit) at para 68), if a provision is vague or discursive, it is the less apt to have contractual status.

iv) The context of the provision: a provision included amongst other provisions that are contractual is itself more likely to have been intended to have contractual status than one included among other provisions which provide guidance or are otherwise not apt to be contractual.

v) Whether the provision is workable, or would be if it were taken to have contractual status; the parties are not to be taken to have intended to introduce into their contract of employment terms which, if enforced, not be workable or make business sense: see Malone v British Airways, [2010] EWCA Civ 1225 at para 62.

64. Andrew Smith J's approach was approved in Fynes v St George's Hospital NHS Trust [2014] EWHC 756 (QB) at paras 64 and 67 and is cited with approval in two leading practitioners' handbooks: Harvey on Industrial Relations and Employment Law at para 309 and Tolley's Employment Handbook at para 8.13.

65. Adopting the approach in Alexander v Standard Telephones and Cables Ltd (No 2), and having regard to the factors identified in Hussain v Surrey and Sussex Healthcare NHS Trust, I am satisfied that the disciplinary procedures in the Guidelines did form part of the Plaintiff's employment contract. They were important to the overall contractual relationship between the parties; the level of detail was sufficiently concrete to render them enforceable without requiring the Court to engage in micro-management; they were certain; there were other provisions in the Guidelines which were expressly intended to be contractual – although as the disciplinary procedures were not expressly stated to be contractual I accept that this is a point which could cut either way; and they were workable. Moreover, Mr Platt, when giving evidence, accepted that the disciplinary procedures in the Guidelines were part of the employment contract.

66. Relating those procedures to the written statement of employment, they were in my judgment applicable to misconduct, like the Plaintiff's persistent lateness, that was not so serious as to justify dismissal without any prior warning. Mr Platt accepted in evidence that the Plaintiff's persistent lateness was not gross misconduct, and I am satisfied that the Defendant, which invoked a procedure involving the issue of various warnings, did not treat it as such.

67. Whatever the Defendant's normal practice may have been, there was no contractual requirement that, even in a case of repeated rather than serious misconduct, the Defendant was required to suspend the Plaintiff rather than dismissing him. But the Defendant was required to issue two written warnings prior to dismissal. I reject Mr Rothwell's submission that the prefatory wording to the concrete and detailed steps set out in the

disciplinary procedure obviated the need for the Defendant to comply with them: if the Defendant could disregard its own disciplinary procedure on a whim that would undermine the point of having one. As Article 35 of the Collective Agreement stated, the objective of the disciplinary procedure:

> is to clarify the steps that may be taken in dealing with matters of discipline so that all concerned understand their rights and obligations.

68. The Defendant purported to issue two written warnings on 18th July 2013. However the contractual disciplinary procedures provide that a written warning must not only point out the misconduct concerned but must also state that there must be an improvement within a specified time. Failure to make the necessary improvement will result in a second written warning. It follows that a first and second written warning cannot both be given on the same occasion.

69. Analysed correctly, what was given on 18th July 2013 was in fact one written warning, albeit that it was in two parts and related to two separate sets of incidents. The warning failed to state that there must be an improvement within a specified time. Nonetheless, I am satisfied that it complied sufficiently with the requirements of the contractual disciplinary procedure to count as a first written warning.

70. As the Plaintiff was given a first written warning, part of which was described as such, on 18th July 2013, Mr Walker's prior email of 13th July 2013 cannot reasonably be considered as a first written warning. Particularly as it appears to relate to behaviour which post-dates the behaviour which was the subject of the 18th July 2013 warning.

71. The Plaintiff was not given a second written warning prior to his dismissal.

72. The upshot is that as the Defendant dismissed the Plaintiff for repeated misconduct without the benefit of two written warnings it acted in breach of the disciplinary procedure under the Plaintiff's contract of employment. It follows that the Plaintiff was wrongfully dismissed.

Going forward

73. I accept Mr Platt's evidence that the Defendant tries to be the best employer that it can be. There are, however, various aspects of the Defendant's conduct in this matter which give cause for concern. I trust that going forward the Defendant will address them.

(1) An employee's written terms and conditions should state accurately his actual terms and conditions of employment. That is the point of the written terms and conditions. In the Plaintiff's case they did not.

(2) A contractual disciplinary procedure is a binding obligation upon the employer, not merely a list of helpful suggestions. It is therefore important that management is aware of the procedure and follows it. To the extent that Mr Walker was aware of the disciplinary procedure, he appears to have treated it as an *a la carte* menu. It was not.

(3) Human Resources should advise management on disciplinary procedures and management should follow that advice. This is because the role of Human Resources includes ensuring that correct disciplinary procedures are followed. This requires that the head of Human Resources should feel empowered to stand up to management if management is following an incorrect procedure. In the present case Ms Whitehurst was aware that Mr Walker was not following the correct disciplinary procedure but did not feel able to intervene to correct him. In her words, she was not a part of management: she was a supervisor. This aspect of the Defendant's workplace culture needs to change, perhaps by upgrading the status of the head of Human Resources to management level.

HRA complaint

74. The Plaintiff claims that he was unlawfully discriminated against on grounds of his national origins – he is Bermudian – in that he was allegedly

dismissed to make way for two Canadian expatriate workers, who were both allegedly hired to do his job. He relies on section 2(2)(a)(i) of the HRA read in conjunction with section 6(1)(b).

75. Both Canadian employees were hired initially for three months, but with a view to an extension for a further twelve months. In both cases their employment commenced sometime in the period 15th July 2013 to 15th August 2013. Both their positions were advertised. One Canadian was hired as an electrical foreman, the other as an electrician. They resigned for reasons which were not related to their conduct or performance in the workplace on 27th September 2013 and 8th November 2013 respectively. There is no evidence to support the Plaintiff's initial allegation that the Defendant got rid of them to undermine his complaint, since withdrawn, to the Human Rights Commission. The Plaintiff accepted when cross-examined that the employee appointed as electrical foreman had substantially more experience than he did and that there was more than enough work for all three of them.

76. I am satisfied that neither Canadian worker was employed to replace the Plaintiff. He was not dismissed to provide a job for them or anybody else, but because of his continued lateness. The Plaintiff's claim that he was unlawfully discriminated against is therefore dismissed.

Damages

77. The Plaintiff is entitled, subject to mitigating his loss, to damages for wrongful dismissal. There are two limbs to this award. First, he is entitled to damages representing the pay which he would have received up to the date when the proper disciplinary procedures, if carried out, would have been concluded. See Gunton *per* Brightman LJ at at 471 F and Bermuda Hospitals Board v Woods-Forde *per* Zacca P at paras 29 and 31 – 32.

78. Second, and on top of that, he is entitled to damages representing the pay which he would have received had he been given reasonable notice of

termination once the proper disciplinary procedures had been carried out. See Gunton *ibid* and Wallace v United Grain Growers Ltd [1997] 152 DLR (4th) 1, SCC, *per* McLachlin J, dissenting in part but not on this point, at para 115, approved in Johnson v Unisys Ltd [2003] 1 AC 518, HL, *per* Lord Hoffmann at para 39.

79. If the proper disciplinary procedures had been carried out, the Plaintiff would not have been dismissed on 27th September 2013 but issued with a second written warning. In answer to a question from me, he stated that, no matter how many written warnings or suspensions he received, his position would have been that he was not contractually required to start work until 8.00 am. I am satisfied that, although he did not really believe that that was his contractual start time, his answer did accurately reflect the fact that further disciplinary measures short of dismissal would have been unlikely to induce him to observe a regular start time of 7.30 am.

80. Given the Plaintiff's response to the various communications which he did receive from management about his punctuality, I conclude that if he had been given a second warning he would probably have been punctual for a short time and then relapsed. In my judgment, after two weeks from the date of a notional second warning the Defendant would most likely have been in a position to conclude that that warning had not been complied with. For the first limb of his award, I shall therefore award the Plaintiff damages equal to two weeks' pay.

81. As to the second limb of the award, damages for reasonable notice are intended to compensate the employee for his loss of earnings while seeking fresh employment. See Wallace v United Grain Growers Ltd, *per* McLachlin J at para 115. In Bermuda they are typically quite modest. See the discussion, which was not disapproved on appeal, in Woods-Forde v Bermuda Hospitals Board [2013] Bda LR 79, SC, at paras 61 – 65. Taking into account the fact that Bermuda is in a recession, I find that a reasonable notice period would have been three months. For the second limb of his

award I shall therefore award the Plaintiff damages equal to three months' pay.

82. I am satisfied, based on the documentary evidence which he has adduced, that since his dismissal the Plaintiff has made every effort to mitigate his loss by finding a new job, although unfortunately so far with little success.

Summary

83. The Plaintiff succeeds on his claim for wrongful dismissal. Not because the Defendant did not have cause to dismiss him, but because the Defendant did not follow the contractual procedure for doing so. I award him damages equal to his pay for three months and two weeks, together with interest at the statutory rate. His claim that he was unlawfully discriminated against is dismissed.

84. I shall hear the parties as to costs.

DATED this 14th day of January, 2015

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Hellman J