[2019] SC (Bda) 42 App (22 July 2019)

In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2018: No. 049

BETWEEN:

JEROME ROBINSON
(1609 VIP EXECUTIVE LIMITED)

Appellant

-and-

KAENORI BURCHALL

Respondent

Before: **Hon. Assistant Justice Pettingill**

<u>Appearances</u>: **Mr Jerome Robinson, In Person for the Appellant**
Ms Kaenori Burchall, In Person for the Respondent

Date of Hearing: **July 4, 2019**

Date of Judgment: **July 22, 2019**

EX TEMPORE JUDGMENT

Appeal against a decision of the Employment Tribunal

1. This is an Appeal from a decision of the Employment Tribunal on April 25 2017, where it was concluded that the Respondent, Kaenori Burchall, had been unfairly dismissed by the Appellant, her employer 1609 VIP Executive Ltd, represented by Jerome Robinson.

2. The Tribunal reached its conclusion of "unfair dismissal" largely on the basis (paragraph 16 of the Ruling) that the Tribunal was not presented with any evidence of "serious misconduct" which would allow for "summary dismissal" without notice or payment in accordance with s.25 of the Employment Act 2000 ("The Act").

3. The Tribunal Ruling indicated that it was informed by s.19 of The Act with regard to the law relating to probationary periods and went on to site the relevant section fully in its ruling.

   The Tribunal further found (para 19) that:

   > ***"Inherent in any contract during the probationary period is the obligation of the Employer to monitor the performance of the Employee and, respecting section 27(1) of the "Act" to give the Employee "a warning and appropriate instructions as to how to improve his performance".***

4. This is not a provision contained in the Act anywhere and particularly not in s.19 as relates to "probationary period".

5. The Tribunal wrongly applied s.27 which deals with termination for "unsatisfactory performance" and seemingly reached the conclusion that the Respondent should have received some form of warning and "instructions" as related to her performance, such application being whilst she was on probation. This may be the Tribunal's well-meaning view but it is not a statutory requirement.

6. The foregoing approach would effectively be trying to put the "square legal peg" in the "round statutory hole"; the latter being s.19 'probationary period" which the Court finds is a "stand alone" section to which s.27 or any other section of the Act for that matter, dealing with "warnings, notice or termination" has no application.

7. If it is concluded, and it was accepted by the employee in this instance in regard to the initial "probation", that there is an operational probationary period then the Employer is legally entitled to terminate the contract of employment for any reason without notice in accordance with s.19.

8. The Tribunal clearly conflates the provisions of s.19 which effectively allows for "summary dismissal" with the sections of the Act that are addressing a "contractual employment" not subject to a probationary period.

9. The simple approach to this matter rests in the facts. It was admitted and agreed by both parties during the Appeal, but unfortunately not pellucid in the Tribunal Ruling, that the first six month's probationary period did actually expire on November 30, 2015 and the extended three months period was not implemented until January 1st 2016, which means that the Respondent was not on probation in a legal sense during December 2015.

10. The law on probationary periods is quite clear in my view and an employee cannot be placed on a probation period once an initial period has expired, which was for a month in this instance, without the employee giving prior notice of the intention to extend the probation, even in circumstances where such period is agreed as it was in this case. I find that s.19 in setting out probation for a "new employee" does not give statutory flexibility to reinstate a period of probation at a later date in time as a convenience to the employer. The reason being obvious as it would give a "license" to employers to impose a probationary period as they wished and obviate the more stringent provisions of the Employment Act required for full time employees.

11. With regard to the findings of the Tribunal it is not so much that the Employee ***"ought properly to have been confirmed in the post on December 30, 2015"***, but more so that her probationary period had finished and she was a de-facto employee and should have been given a written warning and appropriate notice in accordance with s.24 and s.27 of the Act if there were issues with her conduct.

Clearly this did not occur and she was effectively summarily dismissed in February.

12. It is a pedantic but important point to be made that The Tribunal was technically wrong to rule that the Respondent was "unfairly dismissed" as that would require facts that supported the provisions of s.28 which they did not.

13. What has occurred is that the employee was "wrongfully dismissed" given that she was no longer on probation.

14. The law in *Tolley's Employment Handbook 2018* makes the position clear:
"If the end of the contractual probation period is approaching and an employer is not yet sure whether to dismiss the employee or not, the probation period can be extended if the contract includes an express right for the employer to do so or if the employee agrees to an extension. If the employer fails to exercise any such right before the end of the probation period, then the employee automatically passes the probation period".
This is precisely what occurred in this case.

15. In conclusion, for the reasons I have set out above, I find that the Respondent was "wrongfully dismissed" and is entitled in the circumstances to the award for compensation ordered by the Tribunal of $3,298.05 (less statutory deductions) as set out in the Tribunal's findings payable forthwith.

16. No order for costs.

Dated 22 July 2019

MARK PETTINGILL
ASSISTANT JUSTICE