COMMONWEALTH OF THE BAHAMAS **2019/COM/lab/00073**
IN THE SUPREME COURT
Commercial Division

BETWEEN

SAMANTHA COLEBROOKE

Plaintiff

AND

DOCTORS HOSPITAL (BAHAMAS) LIMITED

Defendant

Before: The Honorable Madam Justice J. Denise Lewis-Johnson

Appearances: Vyril Ebong for the Plaintiff
Adrian Hunt for the Defendant

Hearing Date: 4 October 2022

Submissions Date: 6 December 2022

Civil – Employment Contract – Unfair Dismissal – Wrongful Dismissal – Whether the Plaintiff was wrongfully terminated – Duty to accommodate – Economic Hardship - Whether the Defendant company accommodated the Plaintiff following an industrial accident – Whether Defendant took all reasonable steps in finding alternative placement for the Plaintiff – Opportunity to be heard – Natural Justice – Employment Act, Ch 321 – Damages

JUDGMENT

Introduction

1. By a Specially Indorsed Writ of Summons filed 4 October 2019, Samantha Colebrooke ("the Plaintiff") commenced this action against her former employer, Doctors Hospital (Bahamas) Limited ("the Defendant"), claiming damages for wrongful and unfair dismissal.

2. The Plaintiff commenced her employment with the Defendant on 19 August 2013 and was terminated 11 January 2019, amounting to approximately five and a half years of employment. At all material times the Plaintiff was employed as an

Emergency Medical Technician ("EMT") within the Emergency Transport Department at a salary of $430.00 per week ($22,360.00 per annum).

3. The Plaintiff's claim is that following an industrial accident on 27 April 2018 she was wrongfully and unfairly dismissed by the Defendant. She alleges that the Defendant, in breach of Sections 6 and 7 of The Employment Act ("The Act"), failed to accommodate her by providing alternative job placement suitable for her given the injuries sustained. Upon termination, the Defendant paid the Plaintiff the sum of $6,741.38 in accordance with Section 29 of The Act and she abandoned the wrongful dismissal portion of her claim.

4. The Plaintiff claims special damages in the sum of $22,360.00 representing compensatory damages of twelve month's basic salary and $6,966.00 representing three weeks' pay for each year of completed service.

5. In its Defence filed 22 February 2021, the Defendant asserts that the Plaintiff's employment was properly terminated in accordance with Section 29 of The Act. As to its alleged failure to accommodate the Plaintiff, the Defendant's position is that the company made such efforts but were all to the dissatisfaction of the Plaintiff. The Defendant further contends that the termination was made at the request of the Plaintiff given her discontent with their accommodation efforts.

The Issues

6. The issues to be determined are:
    a. Whether the Plaintiff was unfairly terminated;
    b. Whether the Defendant complied with its duty to accommodate the Plaintiff with alternative job placement; and
    c. Whether the Plaintiff is entitled to compensation pursuant to Section 47 and 48 of The Act.

The Law

Unfair Dismissal

7. Part IX of the Employment Act concerns unfair dismissal.

8. Section 34 of the Act provides that every employee shall have a right not to be unfairly dismissed by his employer as provided in Sections 35 to 40 of the Act.

9. Section 35 states:-

> **"Subject to sections 36 to 40, for the purposes of this Part, the question whether the dismissal of the employee was fair or unfair shall be determined in accordance with the substantial merits of the case".**

10. In **B.M.P. Limited d/b/a Crystal Palace Casino v Yvette Ferguson IndTrib App No. 116 of 2012** the Court of Appeal thoroughly discussed relevant Sections of Part IX of the Act and how judges ought to handle claims for unfair dismissal.

11. I find it necessary to cite the words of Conteh JA in this regard:-

> **"34 We find ourselves in agreement with the Tribunal that unfair dismissal is not confined to the five instances provided in ss. 36 to 40 of the Act. We find support for this conclusion from the structure and spirit of the Act. We do not believe that the Legislature by mentioning the five instances itemized in these sections intended to freeze forever other possible instances of unfair dismissal.**
>
> **36 The expression "unfair dismissal" itself is not defined in the Act. What it provides for, in our view, is to itemize instances of what can be called "statutory unfair dismissal" such as provided for in section 36 (dealing with dismissal for trade union membership and activities of an employee); section 37 (dealing with dismissal on ground of redundancy); section 38 (dealing with dismissal on ground of pregnancy); and section 40 (dealing with dismissal in connection with lock-out, strike or other industrial action).**
>
> **37 In addition to the right of every employee not to be unfairly dismissed as provided for in sections 36, 37, 38 and 40, s.35 clearly states that subject to sections 36 to 40 (what we refer to as "statutory unfair dismissal"), *the question whether the dismissal of an employee was fair or unfair shall be determined in accordance with the substantial merits of the case.***
>
> **39 Section 35, in our view, is the touchstone for the determination of whether in any instance of the dismissal of an employee outside of the provisions of sections 36, 37, 38 and 40, is fair or unfair. And this question shall be determined in accordance with the substantial merits of the case. All sections 36 to 40 do is to categorize instances which the Legislature deemed to be unfair cases of dismissal, and s. 34 provides that every employee has the right not to be unfairly dismissed as provided for in those sections. We do not think it was intended to foreclose the categories of**

unfair dismissal. Given the heterogeneity of circumstances in the workplace that could lead to the dismissal of an employee, it would, we think, be rash to spell out in advance, by legislation, what is or is not unfair dismissal of an employee. Can it seriously be said that an employee who is dismissed by his employer for no reason other than his or her appearance will not found a claim for unfair dismissal because that instance is not listed in Sections 36, 37, 38 and 40 of the Act?"

Duty to Accommodate

12. The Act is silent on an employer's duty to accommodate. However, in determining this issue judges have cited regional decisions for authority on the matter.

13. In **Island Hotel Company Limited v. Carey-Brown [2018] 1 BHS J. No. 134** Sir Michael Barnett stated:

> **"37 In a very helpful article "The Duty to Accommodate in the Canadian Workplace" Professor Michael Lynk of the Faculty of Law of the University of Western Ontario summarized the Canadian jurisprudence on the subject. He said:**
> **"1. Leading Principles of Accommodation**
> **The essence of the duty to accommodate is straight-forward to state: employers and unions in Canada are required to make every reasonable effort, short of undue hardship, to accommodate an employee who comes under a protected ground of discrimination within human rights legislation. In most cases, the protected ground requiring an accommodation is a disability, although recent accommodation cases have involved other grounds such as religion, gender, and race.**
> **While the general rule is easy to state, the outer boundaries of accommodation are much harder to determine. But this much is clear to date: the duty requires more from the employer than simply investigating whether any existing job might be suitable for a disabled employee. Rather, the law requires an employer to determine whether existing positions can be adjusted, adapted or modified for the employee, or whether there are other positions in the workplace that might be suitable for the employee.**

The employer must accommodate up to the point of "undue hardship". While there is no single definition in law of this term, the various decisions on accommodation make it clear that this effort must be substantial. The case law has clearly said that the employer's must show that its attempts to accommodate were "serious", "conscientious", "genuine", and demonstrated its "best efforts." The Supreme Court of Canada in 1999 endorsed this threshold, stating that employers must establish that it is "impossible to accommodate individual employees ...without imposing undue hardship." Once the employee has established a prima facie case that she or he has a mental or physical disability that requires employment accommodation, the burden then shifts to the employer to prove that every reasonable effort was made to accommodate the employee's disability."[Emphasis added]"

14. The duty to accommodate however is not absolute. In **Samantha Johnson v Paradise Enterprises Limited [2022] 1 BHS J. No. 121** Stewart J cited **Garricks (Caterers) Ltd. v Nolan [1980] IRLR 259 (EAT)** where Slynn J stated:-

    ".....Clearly, employers cannot be expected to go to unreasonable lengths in seeking to accommodate someone who is not able to carry out his job to the full extent. What is reasonable is very largely a question of fact and degree for the Industrial Tribunal. If, here, it had been shown to their satisfaction that this temporary special arrangement could not reasonably be continued for a longer period, then no doubt the Tribunal would have been entitled to come to the conclusion that the company had done all that was reasonable."

15. The authorities indicate that the onus is on the Defendant to prove that it took the necessary steps to accommodate the Plaintiff who was injured as a result of her accident on the job.

The Evidence

The Plaintiff's Evidence

Samantha Colebrooke

1. The Plaintiff's evidence consisted mainly of a recollection of events which led to her industrial accident on 27 April 2018.

2. On 10 May 2018, under diagnosis of Dr. Downes, she underwent surgery for the Lumbar Hernia. She underwent another surgical procedure in or about August 2018 which increased the timeline for her industrial leave.

3. On 1 October 2018 her attending physician, Dr. Downes recommended that she be placed on light duties until 30 October 2018. The restrictions included no lifting of any kind or prolonged standing. Shifts should be restricted to a maximum of eight hours and walking to remain at a minimum.

4. Given the recommendation from Dr. Downes, the Defendant requested that the Plaintiff undergo a Functional Capacity Evaluation (FCE) test performed by its Associate Health Department (AHD). The examination took place on 1 November 2018 and was prepared by Occupational Therapist Zenobia Neely. The results of said test revealed that she was not capable of performing the physical demands of target job (EMT). The recommendation of the FCE states:

   "Mrs. Colebrooke can return to the target job demands as an EMT in a modified capacity.

   To minimize further injury to the client, and others including colleagues and patient/s, Mrs. Colebrooke should refrain from lifting carrying, pushing or pulling forces more than 20 to 50 pounds for up to one-third of the hours worked daily. Mechanical lift devises should be used where possible. Mrs. Colebrooke can still perform her duties in other areas such as dispatcher or driver if possible."

5. She contends that on 9 November 2018 after taking the FCE, which showed that she had the capacity to work but no strenuous work, the Human Resources "HR" Department of the Defendant denied her request to perform light duties as recommended by Dr. Downes.

6. The Plaintiff testified that on 11 January 2019 while on sick leave she received a call followed by a letter of disengagement from the Defendant wrongfully and unfairly terminating her contract of employment.

7. She alleges that the termination letter was sent to her without any previous discussion concerning the termination or disengagement of employment.

8. Under cross-examination she stated that she welcomed the position of Dispatcher as recommended by the FCE. However, she was told by the Human Resources Department that there were no vacancies for this role. She claims that the second time she inquired about the role of Dispatcher she was told that her pay grade is much higher than a Dispatcher. After the second denial she requested of Mr. Haven to be placed in patient registration.

9. She contends that Mr. Haven indicated to her that patient registration is a different path requiring computer training and cash flow knowledge. To which she responded that she is not 'un-trainable'. She confirmed that none of the information concerning their discussion of placement is in her witness statement as all of her requests were verbal. She indicated however that this information was communicated to her attorney.

10. She denies ever being placed in the Communications Department and reporting to Tamika Rolle as she never returned to work following her sick leave.

11. She also explained that she never asked to be terminated nor did she have a meeting with Mr. Haven regarding same.

The Defendant's Evidence

Paul Haven

12. Paul Haven serves as the Vice President of Human Resources for the Defendant since 27 March 2006.

13. He explained that contrary to the note provided by the Plaintiff's doctor indicating that she could return to work at full capacity, the conclusion of the FCE was that the Plaintiff could only work in a modified capacity.

14. Mr. Haven testified that once Dr. Antonio-Collie of the AHD advised the Plaintiff that she could not allow her to return to duties as an EMT, the Plaintiff asked to be placed in a job function that could accommodate the restrictions recommended in the FCE.

15. He claims that he personally met with the Plaintiff on 27 November 2018 in the HR Department and advised her that there were no current vacancies or positions that could accommodate the restrictions recommended in the FCE.

16. He contends that the Plaintiff expressed displeasure with the Defendant's attempts to accommodate her. This culminated in the Plaintiff requesting the Defendant to terminate her employment.

17. Under cross examination he clarified that she could not return in a modified capacity as the nature of her jobs required her to lift, pull and push 20 to 50 pounds. Even with the mechanical lift there are situations an EMT would encounter with the lift that can expose them to unexpected risk.

18. Mr. Haven claims that the Plaintiff was given an opportunity to speak for herself as to why she should not be terminated during the meeting on 27 November 2018. The decision to terminate the Plaintiff was completed in January 2019 when she asked to be paid out. It is his evidence that the Plaintiff expressed a displeasure and unhappiness with working at the Defendant hospital. The termination was a means of honoring her request.

19. Mr. Haven clarified that the Plaintiff could not fill the role of Unit Secretary as there were no vacancies and she did not meet the qualifications required. The qualifications of an eligible candidate were to have at least a minimum of one or two years of administrative office experience and computer skills denoted by a certification in Microsoft Office.

20. He accepted that none of the information concerning their meetings or discussions of her place were before the Court. Mr. Haven stated that all information were sent to his leaders.

21. He further testified that the Plaintiff stated that she was not interested in the dispatcher position as it was boring to her.

22. Mr. Haven clarified that the termination letter did not reference the Plaintiff's request because it was a standard template letter used when terminating an employee with pay as opposed to a letter terminating an employee with cause.

Decision

23. The Court is tasked with determining whether the Plaintiff was unfairly dismissed from her position as an EMT for the Defendant hospital.

24. The Plaintiff submits that despite the clear recommendation by the Defendant's AHD following a FCE that the Plaintiff could return to targeted job demands as an EMT in a modified capacity, the Defendant rejected the recommendation and made no attempts to accommodate her. It is argued that there was no offer or indication by the Defendant to find a suitable alternate position for the Plaintiff within the organization to accommodate her.

25. It is the Defendant's case however that it made efforts to accommodate the Plaintiff, which led to her being placed in its Communications Department, where she worked for a few months. After expressing unhappiness with that position, the Plaintiff was advised that there were no vacancies or positions that could accommodate her having regard for the restrictions set out in the FCE. The Defendant states it was the Plaintiff who in fact requested to be terminated.

26. The Disengagement of Employment and Statement of pay-out letter stated the following:

> *"Samantha,*
>
> *After careful thought and consideration, we have decided to disengage your employment with Doctors Hospital effective January 11, 2019. In accordance with the Employment Act 2001, Part VII, 29.1, (a) (i) (ii) you are entitled to the following:*
> *...*
>
> *We thank you for your contribution you have made to Doctors Hospital and wish you well in your future endeavors."*

27. The Defendant bears the burden of proving that it made satisfactory attempts to accommodate the Plaintiff given her injuries or that in continuing to accommodate her the hospital would incur undue hardship.

28. Unfortunately, both parties provided inadequate and insubstantial evidence to the Court. Both parties made allegations that were not supported by any documentary evidence. The Plaintiff stated that she made specific requests to Mr. Haven however her Witness Statement contained none of this information. The Defendant alleged that the Plaintiff worked in the Communications Department 'for a few months' under Tameka Rolle, however no evidence of this was produced to the Court nor did Mrs. Rolle file an Affidavit or witness statement attesting to same.

29. I accept that the Plaintiff could not be placed in patient registration due to her lack of the necessary qualifications. I do not accept that there were discussions with the Plaintiff about placement in different departments.

30. The Defendant claims that in a November 2018 meeting between the Plaintiff and Mr. Haven, the Plaintiff expressed a dissatisfaction with the placement options being given to her, and she asked to be terminated as a result. I do not accept Mr. Haven's evidence. I note that it was two months after this meeting the Plaintiff was terminated. The Defendant cannot now rely on an alleged request to be terminated given two months prior.

31. The Plaintiff also argues that she did not have an opportunity to be heard and make representations for herself as to the reason why she should not be dismissed. The only evidence of a meeting between the parties is that of the 27 November 2018 meeting. I am of the view that the two months prior to termination was ample time for the discussions and placement options to be explored.

32. In **Bahamasair Holdings Limited v Omar Ferguson SCCivApp No. 16 of 2016**, Justice Crane-Scottm Ja stated:

> **"54. At the very minimum, an employer's duty under section 34 to act fairly would require the employer to adhere to the audi alteram partem rule of natural justice: that most cherished principle of procedural fairness which mandates that no man should be condemned, punished (or as in this case, dismissed) without being given a hearing and the opportunity to explain or respond to any charge or adverse decision to be taken against him. We hasten to add that the right to be heard does not require the employer to conduct a full blown hearing but may be satisfied by giving an employee an opportunity before a decision is made, to make representation (whether in writing or in person) to the employer as to why he should not in the circumstances be terminated."**

33. The Court finds that the Plaintiff was not given an opportunity to be heard. That the only opportunity given for the Plaintiff to be heard on the matter was during the 27 November 2018 meeting, the facts of which are disputed. I do not find Mr. Haven to be a credible witness. The suggestion that the Defendant was simply honoring the Plaintiff's request to be terminated has no legal merit or standing. I do not accept that the Defendant was honoring the Plaintiff's request to be terminated. It is the employer's duty to engage the employee, provide an opportunity for the employee to be heard and have meaningful dialogue, Justice demands it.

34. Although the Plaintiff was dismissed in accordance with Section 29 of the Act, the Court must still determine whether the termination was unfair. That is, whether it offended against the principles of natural justice. Section 35 of The Act requires the Court to consider the merits of each case. Having regard for this case, the evidence led and the law, I find that the Plaintiff was unfairly dismissed. She was injured on the job, the Defendant's specialist advised that she could not function fully in the previous position and the Defendant failed to show serious attempts to accommodate her or to allow for the Plaintiff to be heard prior to termination.

35. When the Court considers the merits of this case and what efforts were made by the Defendant to accommodate, it falls well below a reasonable standard. By the Defendant's own evidence there were two placements made. While the Court does not expect the Defendant to place the Plaintiff where she cannot properly function simply to accommodate her, an earnest attempt to find her a job she could perform is required.

Conclusion

36. For all of the reasons stated above, the Court having heard the evidence, watched the demeanor of the parties and having considered the relevant law finds as follows:-

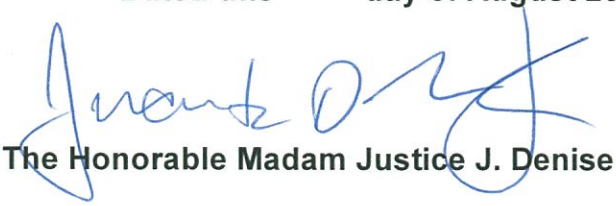
    I. That the Plaintiff was unfairly dismissed by the Defendant.

    II. I am not satisfied that the Defendant took every reasonable step to accommodate the Plaintiff in an alternative position. There is not sufficient evidence to show that attempts were "serious, conscientious, genuine and demonstrated its best efforts".

    III. Damages to be assessed by the Registrar.

    IV. Cost to the Plaintiff to be taxed if not agreed.

Dated this day of August 2023, A.D.



The Honorable Madam Justice J. Denise Lewis-Johnson