REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO: CV2009-02309

BETWEEN

CHERYL SEALEY JAMES

CLAIMANT

AND

GLENFORD DAVIS

DEFENDANT

Before the Honourable Madame Justice C. Pemberton

Appearances:

For the Claimant: Mr M. Jones
For the Defendant: Mr. J. Toney

JUDGMENT

[1] **BACKGROUND**

Mr Glenford Davis the Defendant (GD) owned and operated an establishment called "Aging At Home" ("the Home"). By its name, Mr Davis provided a resident service to the elderly in the Community of Sangre Grande and environs. Ms Cheryl Sealey James the Claimant (CSJ) was employed at that establishment as a cook.

This action arose out of an incident which took place at the Home which allegedly visited CSJ with injury to her person.

[2] **HISTORY**

CSJ filed a Claim Form and Statement of Claim on 26th June 2009. GD duly defended on 11th December 2009. The Case Management Conference came up on 18th January 2010. At that session, I urged the parties to meet to settle this matter. After the matter meandered through the system, the trial proceeded on the sole question framed as follows:

> ***Whether CSJ's injuries flowed from the incident at her workplace on 27th June 2005?***

[3] **CLAIMANT'S CASE**

THE LIFTING INCIDENT

On 27th June 2005, the Claimant was employed as a cook at the Home. CSJ stated that upon the instruction of her supervisor one Ms Lisa Sooklal she assisted in lifting a disabled patient who weighed in excess of 136kg (300 lbs) from the ground to his wheelchair. As a result of lifting this patient CSJ sustained severe personal injuries. The particulars of her injuries were described as:

a. Cervical disc injury.
b. C4-5 to C7-D1 levels: mild disc/small disc protrusion.
c. Pain in left arm.
d. Pain in neck.

There were medical reports attached which will be adverted to later.

[4] CSJ has claimed damages in breach of contract against GD claiming that GD had breached the implied terms of her employment contract with respect to provision of a safe workplace; having placed CSJ in danger and/or harm without first having identified that danger or harm; not having taken adequate precaution for her safety and well being not having provided a safe system of work and failing to warn CSJ of the dangers to which "by reason of such work" she was exposed. There was a claim as well in negligence and breach of duty of care to provide a safe system of work.

[5] **GD's DEFENCE**

GD admitted that Lisa Sooklal was CSJ's Supervisor. On the day in question she was performing her duties as a cook in the kitchen. This was so as the official Supervisor Ms Joan Bobb was not at work. GD denied that any instruction to lift any patient was dispensed by Lisa Sooklal. GD acknowledged that CSJ assisted in the lifting exercise but in the way of a good Samaritan. In any event, the subject of the lifting was not more than 200 lbs. There were others involved in the exercise as well including RAJISTRE SAMMY who stabilized the wheelchair. GD recognised that there was an implied term in the contract of employment that he should take all reasonable precautions for CSJ's safety while she was "engaged upon her work" and not to expose her to risk or unnecessary risk of damage and to provide her with a safe system of work but there was no failure on his part in the execution of his implied obligations nor did he fail in his duties as alleged.

[6] In support of his stance, GD asserted that CSJ reported for duties after the date of the lifting which allegedly caused her injuries until 5th September 2005 when she proceeded on her vacation, never missing a day. On 19th September 2005 GD called CSJ to enquire about her return to work and was then told of the injury. GD stated that CSJ further informed that she informed Supervisor Ms Joan Bobb of the lifting incident but told her nothing of the injury.

[7] GD further disclosed that there were two conditions attaching to CSJ's employ:

(1) that for religious observances that she be permitted not to work on Saturdays; and

(2) that transporting load caused pain and discomfort to her neck so that she not be mandated to make vegetable purchases at the market.

[8] **REPLY**

It is noteworthy that CSJ did **NOT** file any Reply to the positive assertions made in the Defence.

[9] Mr Toney filed a Notice on 3rd May 2012 objecting to certain parts of the claim. Mr James responded, I shall not rehearse the submissions or arguments but suffice it to say that the medical evidence as presented did not speak to whether the injuries reported on CSJ's MRI results could have or flowed from her injury in 2005. The first visit took place three months after the alleged incident and the findings from the CT Scan and MRI were culled some three years after the alleged incident.

[10] **EVIDENCE**

I have no doubt that CSJ sustained injury to her person. The question remains did the lifting incident proximate cause her injury or as was put above, did the injuries sustained flow from the lifting incident? That is the question that CSJ has to meet. That is her burden to discharge.

[11] **CSJ'S EVIDENCE**

Ms James confirmed that she was employed as a cook at the establishment and gave a list of her duties – preparing and serving breakfast and lunch to patients, washing dishes, baking bread, taking care of the kitchen generally, going to the market to buy goods in preparation for the said meals. Her hours of work were 6:30 a.m. – 4:00 p.m.

[12] On 27th June 2005 she was performing her duties as a cook in the kitchen when her Supervisor Lisa Sooklal came and instructed her to assist in the lifting exercise. The patient was in excess of 136 kg. It took a while but she and her Supervisor managed the task.

[13] CSJ stated that a few days later she began to experience pains in her back, neck and left leg. She spoke to GD and he told her *"he is a nurse and lifting of a patient cannot do me that"*.

[14] She continued working but she still experienced pains. She asked for her annual vacation early in July 2005 which was then due. GD told her that she could not go until he had found a replacement for her.

[15] In September 2005 she was allowed to go on her vacation leave and she proceeded on leave.

[16] **CROSS EXAMINATION**

CSJ admitted that her duties as cook did not include serving patients breakfast and lunch. She insisted that she washed the dishes after the patients ate and that she went to the market to purchase goods. Later on CSJ told the court that she worked until 4:00 p.m. since she had to prepare dinner, lunch and breakfast.

[17] With respect to the incident, CSJ maintained that the subject weighed 300 lbs. She admitted that she could watch the subject and guess his weight as to her "he was a big man". She testified that she was sure of his weight as "I hear dem saying that. I watch him and come to that conclusion".

[18] With respect to who was her Supervisor CSJ insisted that her Supervisor was Lisa Sooklal. She further insisted that she spoke to GD about the incident. She denied that the conversation in which he told her that he was a nurse and that her injuries could not have been caused by lifting a patient that took place in September 2005. She said that the conversation took place when she told him about the pain. She claimed that she complained everyday to GD about her pain.

[19] She claimed that she requested her vacation leave in July 2005. CSJ claimed ignorance of the procedure for requesting vacation leave as it was the first time that she was going on vacation leave. She also claimed ignorance of the practice of getting a replacement before proceeding on vacation leave. The day of the trial was the first time she was hearing of any procedure.

[20] Mr Toney then confronted CSJ with a series of medical certificates submitted by her to GD.

(1) Medical Certificate dated 19th September 2005 – some three months after the incident – complaint, chest pains, 5 days sick leave. CSJ admitted that nowhere

on that Medical Certificate was neck or back or arm pains mentioned and that that was different. She admitted undergoing an X-Ray on her chest on instruction of the said Doctor.

(2) Medical Certificate dated 7th November 2005 CSJ some five months after the incident – Medical Certificate indicating that she was seen on 10th March 2005 an illegible diagnosis by which she procured sick leave for 120 days. In her explanation CSJ indicated that the Doctor made a mistake about the date that she was seen. CSJ admitted to doing a masonry course which commenced in January 2005. She denied that she told R. Sammy that she had to mix cement and "pelt" it on the wall.

Mr Toney put the case to her that the entire matter was based on a fabrication, which she vehemently denied. CSJ called no other witnesses.

[21] **COURT QUESTIONS**

I felt moved to ask CSJ some questions. Of moment was, whether after she suffered the alleged injury, she asked for assistance to perform her duties in the kitchen and she replied no. CSJ admitted that she stopped attending the masonry course in July 2005 as she was not feeling well. She claimed that she left when the class instructor moved to putting up blocks. That ended the case for CSJ.

[22] **GD'S DEFENCE**

Mr Davis confirmed that CSJ was in his employ as a cook. Her duties included meal preparation for all of the patients, cooking, baking, keeping the refrigerator, cupboard and kitchen area in a sanitary condition and serving breakfast and lunch to the patients. GD confirmed the conditions under which CSJ accepted her employment, that she would not work on Saturdays and she would not be charged with purchasing vegetables from the market due to her suffering from neck pains associated with carrying loads in her hands. GD's evidence then turned to a conversation which he had with CSJ in which he learnt of the lifting incident of 27th June 2005 and her alleged injuries. He enquired whether she

reported the incident and was told that the incident was reported to CSJ's Supervisor Ms Joan Bobb. He indicated that he received no report from Ms Bobb.

GD did investigate the report and ascertained that Ms Lisa Sooklal a caregiver, Ms V. K. the Secretary and SCJ were involved in the lifting incident while RS held the wheelchair.

[23] GD revealed that he received two sick leave certificates relating to CSJ – one dated 19th September 2005 indicating that she was suffering from chest pains and recommending five days sick leave. CSJ returned to work after the period expired until 2nd October 2005. She did not report for duties on 3rd October 2005 but instead submitted another sick leave certificate dated 7th November 2005 recommending that CSJ be away for 120 days. The diagnosis was illegible but the Doctor wrote that he saw CSJ on 10th March 2005.

[24] A review of CSJ's attendance record showed 100% attendance from the date of the lifting incident - 25th June 2005- until 2nd September 2005 when she proceeded on vacation leave. A copy of the Record was produced in court.

[25] **CROSS-EXAMINATION**

GD confirmed his testimony with respect to his retaining CSJ's services as a cook and the terms of her employment. He trained his caregiver staff on how to care for patients and on Theories of Aging. He stated that the patient involved in the incident had no legs but he was **NOT** a "big fat man". He lifted him by himself and it was totally incorrect to say that he was in the excess of 300 lbs. He stated that he instructed his staff on how to help the patient get into his chair, should he fall off.

[26] GD admitted that LS was the most senior person on duty but she **never took** on the responsibility as Supervisor. GD admitted that Mrs Bobb was not present at the time of the lifting incident. He confirmed that he knew of CSJ's injury only in September 2005, but he was told of the lifting incident on the same day that it occurred.

[27] He confirmed the contents of his conversation with CSJ. He denied that he prevented CSJ from proceeding on her leave when she had asked to go in July 2005. He denied any conversation between CSJ and himself in July concerning her going on leave. He stated that it was not true that CSJ could not have proceeded on vacation leave if she had asked to go in July because she could not find a replacement cook. GD stated that he had a substitute cook. CSJ worked 5 days per week and did not work on Saturdays. The substitute worked when CSJ was not on duty and worked during her vacation period. He reiterated that he received no request from CSJ for leave.

[28] GD stated that he never had much problem with CSJ. He was asked to complete CSJ's NIS Form, when he did so he answered "**NO**" when asked if he was informed of the injury as per the form. He confirmed the number of persons involved in the lifting incident.

[29] **RAJISTRIE SAMMY**

This witness is a Geriatric Nurse/Supervisor engaged in part-time employment at GD's establishment. She has been there for the past eight years. She knows CSJ and knew her to be the cook at GD's home. She was part of the lifting incident. She held the wheelchair. CSJ never complained to her of any pain or injury associated with the lifting incident. She had a very good relationship with CSJ and she confided her attendance at the masonry course to her and how much mortar she would throw upon a wall. Even after she left the home, RS was not told of CSJ's injury.

[30] **CROSS-EXAMINATION**

There was nothing remarkable about the cross-examination.

[31] **ANALYSIS OF LAW AND EVIDENCE**

(1) CONTRACT CLAIM

Mr James framed this claim as breach of an implied term of a contract of employment and as an alternative a claim in negligence. It is accepted that implied terms must find their home in a clear contract in this case a contract of employment. As far as the

contract claim is concerned, Mr James seem to have abandoned his claim under this head and rightly so. The terms to be implied must relate to the substantive terms and cannot be at large. All I would say is that it is an uncontroverted fact that CSJ was employed as a cook in the kitchen with clearly articulated duties. Nowhere did these duties include lifting patients or assisting in their care in any form or fashion save providing their meals. There is no allegation of a breach of any duties that GD may have had to CSJ with respect to her tasks as cook – no complaint of faulty wall tiles, floor tiles or kitchen equipment. The implied terms and attempts at particulars as put forward are therefore of no relevance to the contractual relationship between CSJ and GD.

I say no more other than that the claim in contract therefore fails.

[32] (2) **NEGLIGENCE CLAIM**

The time honoured dicta in **MORGAN v SIM** (1857) 11 Moo. P.C. 307 is most instructive in this case. The Learned Lord Wensleydale stated:

> *The party seeking to recover compensation for damage **MUST** make out that the party against whom he complained is in the wrong. The burden of proof is clearly on him, and he **must show** that the loss is to be attributed to the negligence of the opposite party. **If at the end he leaves the case in even scales and does not satisfy the court that it was occasioned by the negligence or default of the other party he cannot succeed.***
> [Emphasis mine]

This is the hurdle that CSJ must cross. The main constituents – duty, breach and damage must be present. This case revolves around the existence of the duty of care and implicit and that would be the issue of causation. Therefore two main issues arise:

(1) Whether the injuries suffered by CSJ flowed from the incident at the workplace on 27th June 2005;

(2) If this is answered in the affirmative, has CSJ made out that GD owed her a duty of care?

The Pleadings and Evidence would be examined against this backdrop.

[33] **ANALYSIS AND CONCLUSION**

To determine causation, that is whether the unfortunate incident caused CSJ's injury, what must the court be alive to especially in situation such as this? The obvious answer is direct, clear and cogent evidence that an unfortunate act or series of acts resulted **from** a breach of duty of care and resulted **in** damage to an injured person. In all, the burden of proof in this case falls on the Claimant to establish on a balance of probabilities that the lifting exercise (the unfortunate action) caused her injuries. There must not be any activities which CSJ engaged in such as those during her Masonry course, which started in January 2005, and continued until July 2005 after the lifting episode, which could reasonably have caused the injuries.

[34] **TERMS OF CONTRACT**

Mr James did not reply to the Statements of fact dealing with the terms of contract re going to purchase vegetables in the market. The witness statement attempted to deal with this. This practice is frowned upon. The material is disbelieved. I find that CSJ's duties are as stated by GD.

[35] **CSJ's ACTIONS PARTICIPATING IN THE LIFTING INCIDENT**

I find that CSJ did not make any report relating to any injury or pains suffered. I do not believe that CSJ had any conversation with GD shortly after the incident. That conversation took place in September 2005 when GD enquired about her resumption of duties. I also do not find it probable that CSJ was held captive by her job until she found a replacement. CSJ has exhibited no special skill that was not and could not have been performed by the substitute **already** employed by GD, to do her tasks when she was not there for two days per week. In any event, that was **not** part of her pleaded case.

[36] CSJ did not visit the doctor after 26th June 2009. Mr James did not explain or offer any explanation whether by way of further evidence to the court or upon re-examination on this aspect of his client's evidence under cross-examination even when invited to do so by the Court. Thus there is a lingering doubt as to whether the lifting exercise caused or even contributed to her injury. This court can deal only with the evidence before it.

[37] On a balance of probabilities, I cannot say that CSJ has tipped the scales for this court to find that she has proved her case against GSD that the lifting injury was either the cause of or contributed to her injuries.

[38] I am fortified in this since it is clear that the first indication that CSJ visited medical professionals was three months after the incident. From June 26th 2005 – September 2005 she continued for at least until some time in July with her masonry course and other life activities. She continued to perform her duties as "cook" unaided and did **NOT** ask for help. The medical evidence CSJ presented was unhelpful at best to her case. In addition I am not convinced that CSJ needed to work from June – September when she proceeded on leave.

[39] **OTHER ASPECTS**

THE SECOND MEDICAL

If ever there was a conundrum of inconsistencies, this is one. The esteemed Medical Practitioner issued a medical certificate under his hand in the following terms:

> ***DATE 7th November 2005***
>
> *This is to confirm that the above patient (CSJ) was seen by me on 10th March 2005 suffering from ……. (maybe the neck …) she was advised sick leave for 120 days to take effect from 10th March 2005.*

This has to be taken as is since the author was not in court to explain the document. CSJ did not deny that she submitted these certificates. They would have been available for Mr James's scrutiny before the trial. No objection was taken. This really did not help

CSJ's case at all. Even if we take it as sloppy work of the doctor and that the diagnosis of neck injury was made, it still does not explain why the complaint of neck injury went unmarked on the initial certificate certifying chest pains.

[40] **CONCLUSION**

From inception, this court pointed out to Counsel the pit falls in this case along with the obvious lacunae in the Statement Claim and urged the parties to talk in order to resolve this matter. These efforts bore no fruit. Mr James remained adamant to prosecute the claim as filed. Whilst that remains the right of the litigant, the old adage "a bird in the hand is worth two in the bush" is no more plainly seen than in this case.

[41] The court can only advise up to this time. Now it must now decide the case on the evidence before it.

This I now proceed to do.

[42] **DECISION**

(1) Whether the injuries suffered by CSJ flowed from the incident at the workplace on 27th June 2005;

In answer to (1) CSJ has not presented evidence to the court to directly or inferentially conclude that the "lifting" incident caused or contributed to her injuries. The medical evidence presented at the trial, close in time to the incident disappointed CSJ's cause. Her Counsel had sight of these documents but did nothing to either explain or clarify them. Even if the second medical contained a reference to "neck injury", was it attributable to the lifting incident or was it in relation to CSJ's masonry course, which she pursued until July or other activities, after the lifting incident?

[43] **(2) If (1) is answered in the affirmative, has CSJ made out that GD owed her a duty of care?**

In answer to (2) since (1) could not be established the court is hard pressed to conclude that GD owed to CSJ any duty of care. In addition even if one can argue

that CSJ 'obeyed' her 'supervisor' it is clear that LS was **NOT** CSJ's supervisor. CSJ presented nothing to show or infer that had she not complied with the request, that her employment could have been jeopardised. Further, lifting patients could not in any way be part of one's duties as a cook, which has been clearly articulated by both CSJ and GD. There could be no duty of care foisted on GD in these circumstances as there is no allegation that the safety system for the performance of her duties went awry. When all is said and done, CSJ has not proved her case and her claim for damages for negligence fails.

ORDER

1. **That the Claimant's claim against the Defendant be dismissed.**
2. **That the Claimant do pay to the Defendant costs prescribed in the sum of Twelve Thousand Dollars ($12,000.00).**

Dated this 22nd day of January 2014.

/s/ CHARMAINE PEMBERTON
HIGH COURT JUDGE