

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2013 - 01188

Between

DEBBIE ANN JOLLIE

RACHAEL WINTER

AYANDA WILLIAMS

Claimants

And

SPANCAST CARIBBEAN LIMITED

Defendant

Before the Honourable Mr Justice Ronnie Boodoosingh

Appearances:

Mr Lloyd Elcock for the Claimant

Mr Stanley Marcus SC leading Ms Debra James instructed by Ms Karen Piper for the Defendant

Date: 19 May 2016

JUDGMENT

1. The claimants were employees of the defendant. The third defendant discontinued her claim. The trial proceeded with the first and second claimants.
2. The claim is for emoluments including salary, payments for vacation and public holidays and commissions on sales.
3. The first claimant was marketing manager of the defendant. The second claimant was a sales representative.
4. In January 2010, the company was in financial difficulty. A proposal was made by the defendant that the claimants, among other employees, would work for 4 days instead of 5 days per week and there would be a corresponding 20% reduction in salary. This was on a temporary basis “until further notice” and this took effect on 4 January 2010.
5. The claimants signed as agreeing to this. No dispute can properly be advanced therefore that they did not agree to these terms.
6. The defendant’s managing director, Mr David Williams, says there was an agreement to reduce the vacation leave also, but this was not reflected in the letter prepared by the defendant and signed by the claimants.

7. The first claimant says she and Mr Williams had discussions in February 2011 which led to them signing a document which included that base salary will be kept at 90% effective 01 March 2011 and that commissions and bonuses will be paid based on sales. She signed on behalf of other employees.
8. At paragraph 15 of his witness statement, Mr David Williams said that the claimants in February 2011 were “instructed to revert to a five day work week at 80% of their pre 4 January 2010 salaries”. He does not say whether they agreed to this in his witness statement. He says it was an instruction.
9. In **Burdett-Coutts and Others v Hertfordshire County Council [1984 IRLR 91 Jones J** at paragraph 11 said:

“...In my judgment the defendants have sought unilaterally to impose amendments to the contracts of employment here. By doing so they are in breach of those contracts and have repudiated them. The plaintiff, faced with the choice which every innocent party to a contract has, has not accepted that repudiation but is standing on that original contract and saying, as she is entitled to say, ‘I can now recover the total wages which should have been paid to me under the original contract.’”

10. In **Rigby v Ferodo Limited [1987] IRLR 516 at 518-519**, Lord Oliver of Aylmerton stated at paragraphs 13 -14:

“My Lords, the one thing that is clear in this case is that the appellant had no intention whatever of terminating the contracts of employment with its

workforce except by compelling the acceptance of new contractual terms which Mr Rigby and his fellow CSEU members were, as they made it quite clear, unwilling to accept and which they never did accept. Faced with that situation the appellant could have chosen to terminate their contracts on proper notice. It chose not to do so. It could have dismissed them out of hand and faced the consequences. It chose not to do so. It continued to employ them, week by week, under contracts which entitled them to a certain level of wages but withheld from them a part of that entitlement. I can, in those circumstances, see no answer at all to Mr Rigby's claim and the trial judge and the Court of Appeal were, in my judgment, plainly right in the conclusions at which they arrived.

It has been submitted that there was some sort of implied acceptance on the part of Mr Rigby of the appellant's repudiation by working on. At the trial this was put on the basis of estoppel, waiver and acquiescence. All three were rejected by the trial judge and, in my judgment, he was, on the facts which he found, quite plainly right to reject them. I can, for my part, see no other basis upon which it can be argued that the continued working by Mr Rigby and his acceptance for the time being and under protest of the wage that the appellant, with full knowledge of his lack of agreement, chose to pay him is to be construed as an acceptance by him either of the repudiation by the appellant of the original continuing contract or of the new terms which the appellant was seeking to impose.”

11. What is clear from the evidence in the present case, it that the claimants did not agree to this “instruction”. Following the reasoning of these cases, the claimants were entitled to be paid in accordance with the previous arrangement effective 01 March, 2011.

12. Mr Williams accepts the commission agreement but is silent on the reverting to 90% of salary in his witness statement.

13. But his statement that there was an instruction that they would work for 80% of salary is effectively an admission that that is what they were paid from March 2010. In other words he does not say the claimants were paid 90% of their salary from March 2011.

14. The second claimant also relies on this document signed by the first claimant and Mr Williams.

15. The first claimant also says she was not paid for her vacation leave for 2010 onwards. In fact, in 2010 she acknowledged the company was shut down and employees were required to take vacation during this period but that she had to work during this period. The second claimant did not address this matter of her claim to vacation leave in her witness statement except to say what she is entitled to. She does not say how she came to be entitled to the sum claimed.

16. Accordingly, there is judgment for the claimants.

17. The first claimant is entitled to payment of 10% of her salary from March 2011 to 31 December 2012 which is the date claimed up to.

18. The second claimant is entitled to payment of 10% of her salary from 1 March 2011 to 31 December 2012.

19. The second claimant gave no evidence of loss of vacation entitlements in her witness statement. In cross examination she said it was cut by two weeks. This is consistent with what Mr Williams said. I find this aspect of the second claimant's case not proved.

20. The first claimant's salary was \$18,000.00 per month. 10% of this is \$1,800.00 per month. She is entitled to this from March 2011 to December 2012, a period of 22 months. This is \$39,600.00.

21. The second claimant's salary was \$7,892.00 per month. 10% of this would be \$789.20 per month. She is entitled to this from March 2011 to December 2012, a period of 22 months. This is \$17,362.20.

22. The first claimant claimed for 54 days vacation leave. In her witness statement she said she had to work through her vacation periods. But the evidence seems to suggest that the vacation was cut by two weeks per year, which is 10 working days per year. Accepting her evidence of her entitlement to 20 working days vacation leave per year, she would be entitled to payment for 30 days vacation leave for the 3 years. The appropriate way to work out what she is due is to divide her annual salary by 365 days and pay her for 30 days. This gives the sum of \$17,753.42.

23. The claimants were also not paid for the public holidays worked from 01 March to 31 December 2012. They did not particularise in their witness statements which holidays they worked on but were not paid for given that some holidays would have fallen on weekends. This was not satisfactory from an evidential point of view. The court was asked to take judicial notice of the holidays for the relevant period. However, it cannot be proved that the claimants actually worked on those specific holidays. They may

have. They may have been ill. They may have stayed home. The company was also closed during certain periods. This would have impacted on holiday pay. A blanket statement that they were not paid for holidays worked on is not sufficient. I find this aspect of the claim not proved.

24. Mr Elcock in his written submissions quite rightly conceded that the claimants had not proved any entitlement to commissions based on the evidence presented.

25. The defendant must pay the first claimant the sum of \$57,353.42 with interest at 6% per annum from 25 March 2013, the date of the service of the claim form, to the date of judgment. The defendant must pay the first claimant prescribed costs based on the sum of the award and the interest.

26. The defendant must pay the second claimant the sum of \$17,362.20 with interest at the rate of 6% per annum from 25 March 2013 to the date of judgment. The defendant must pay the second claimant prescribed costs based on the sum of the award and the interest.

Ronnie Boodoosingh
Judge