JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 48/2000

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

BETWEEN:	**MANLEY HAYE**	**APPELLANT**
A N D	**FISCAL SERVICES (EDP) LIMITED**	**RESPONDENT**

Christopher Dunkley and Marino Sakhno instructed by Cowan, Dunkley and Cowan for the appellant

Herbert Hamilton and Dorothy Lightbourne instructed by D. O. Kelly & Associates

February 1, 2, 26, and May 21, 2001

DOWNER, J.A.

The appellant, Manley Haye, was formerly employed by Fiscal Services (EDP) Ltd., his last posting being head of the Audit Division. He holds a B.Sc. in electrical engineering and is a specialist in computer programming. The audit department specialises in monitoring data processing, so it is not concerned with auditing as a specialist branch of accountancy. The appellant's initial contract of employment was as Development Manager and its duration was for two years commencing from May 1, 1990. The second contract was for three years commencing May 1, 1992, and his title then was Director of Software Engineering. As this latter contract is an issue, it is convenient to set out its first term, which reads:

"(1) DURATION

Your appointment will be for a period of three (3) years commencing May 1, 1992 and ending April 30, 1995 subject to renewal or extension on terms and conditions to be mutually agreed between the parties no later than three (3) months prior to April 30, 1995."

On November 26, 1993, the following memorandum from Mr. Roy Headley, Acting Managing Director of Fiscal Services, was addressed to the appellant:

"On November 9, 1993 Senior Director Production was informed of certain reorganizational changes and the resulting effect on responsibilities and reporting; she indicated that she would inform you of the decisions taken by the Board of Directors at the meeting held on November 8, 1993.

You will recall that I discussed the changes with you on November 11, and particularly explained that priority attention should be given to implementing the recommendations contained in the report of Mr. Dean Johnson, especially in respect of Functional Requirement Specifications and other related documentation.

I am now writing to advise that effective Monday, November 29, 1993 you should report to me and assume responsibility for the Audit Division. I will discuss with you on that date arrangements for office accommodation."

There was a more detailed memorandum of the same date which reiterated that the changes would be effective as from November 29, and as regards the appellant it was stated:

"iv. Mr. Manley Haye, currently Director – Software Engineering assigned to EDP Audit & Security."

The next relevant correspondence dated June 14, 1994, was the termination of the contract of employment. It reads as follows:

"Dear Mr. Haye,

Re: Termination of Contract

We refer to our letter to you dated July 17, 1992 by which you were advised of the renewal of your contract with Fiscal Services (EDP) Limited as Director – Software Engineering, commencing May 1, 1992 and ending April 30, 1995.

The Company has decided to terminate your contract in accordance with the express terms in section 10 (a) of the contract, and to pay the equivalent of three (3) months salary in lieu of notice.

The attached schedule sets out the payments which will be made to you, and includes the gratuity to which you would ordinarily have been entitled.

You are required to return immediately, the motor vehicle which was assigned to you, DEC PC Notebook, credit card, identification card, documents or other property belonging to the company and which may be in your possession. Benefits under the company's Group Health and Group Life schemes will continue until September 14, 1994.

Kindly accept our best wishes for your future endeavours.

Yours sincerely

Roy A. Headley
Acting Managing Director"

For ease of reference it is pertinent to cite paragraph 10(a) of the second contract. It reads:

"(10) TERMINATION

(a) This appointment may be terminated by either side giving three (3) month's notice in writing;"

The requirement to return the motor vehicle immediately is one of the important issues and will be addressed later.

Against this background it is appropriate to address the first claim by the appellant against Fiscal Services. This claim along with others was rejected by Ellis J. in the Supreme Court after a trial which lasted three days. The order under appeal reads:

> "1) there be judgment for the Defendant with costs to be taxed or agreed:
>
> 2) the costs of the suit taxed in the amount of ONE HUNDRED AND THIRTY-SIX THOUSAND DOLLARS ($136,000) pursuant to Rule 2 Item (9) of the Schedule A of the Rules of the Supreme Court (Attorneys-at-Law's costs) Rules 1998."

The Redundancy Claim

The appellant, Manley Haye, claims statutory compensation pursuant to Sec. 5(1) of the Employment (Termination and Redundancy Payments) Act, (the "Act"). The section reads:

> "PART III. Redundancy payments
>
> 5.-(1) Where on or after the appointed day an employee who has been continuously employed for the period of one hundred and four weeks ending on the relevant date is dismissed by his employer by reason of redundancy the employer and any other person to whom the ownership of his business is transferred during the period of twelve months after such dismissal shall, subject to the provisions of this Part, be liable to pay to the employee a sum (in this Act referred to as a "redundancy payment") calculated in such manner as shall be prescribed."

The above section has two limbs that the appellant must satisfy - (1) that he must be continuously employed for one hundred and four weeks, and (2) he must be dismissed for reasons of redundancy. Since the appellant's employment commenced on May 1, 1990, and was terminated on June 14, 1994, he has satisfied the first limb by 5(1) of the Act.

Section 5(2) (a) & (b) defines redundancy. It reads in part:

> "5.-(2) For the purposes of this Part an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or partly to –
>
> (a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed ;or
>
> (b) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish; or
>
> (c) ..."

With regard to being dismissed by reason of redundancy the onus of proof lies on the appellant. Here is his evidence:

> " I remained in the Audit section until June 1994. I was given no indication as to 10(a) of Contract being invoked. On June 14, '94, I was the only person assigned in Auditing Section Department formerly had 9 persons."

Further evidence that the "requirements" of the Audit Department "have ceased or diminished or are expected to cease or diminish" comes from answers of the Acting General Manager, Lorenzo Grant by way of interrogatories. The relevant answers are as follows:

> "3. In answer to the first interrogatory, namely 'Names of persons who are currently employed within the Audit Division of the Defendant Company and the dates on which they were so employed.' I say that to the best of my knowledge and belief obtained through perusing the relevant files the Audit function is currently being performed by Mr. Rajesh Ananthraman since May 1, 1995."

So from the date of the appellant's dismissal on June 14, 1994, to May 1st 1995, the work of the Audit Department had ceased as no one was employed therein. There was

therefore compliance with Section 5(2) (b) of the Act. There is a further answer relevant to our concerns which reads:

> "4. In answer to the second interrogatory, namely 'Names and positions of all employees terminated by the Defendant's (sic) Company within six (6) months preceding the Plaintiff's termination and within six (6) months thereafter.' I say that to the best of my knowledge and belief the following are the names and positions and dates of termination:

Pansy Murdoch	Personnel Manager	April 27,1994
Kenneth Forbes	Property Manager	May 5,1994
R.A.Harrison	Director-Administration	July 21, 1994
Avril Crawford	Senior Dir. Customer & Business Services	September 14, 1994
Jean Rookwood	Job Processing and Billing Coordinator	September 30, 1994
Izett McCalla	Director-Data Centre	September 30,1994
Andrew Blake	EDP Operations Manager	September 30,1994
Joycelyn McDonald	Data Entry Supervisor	September 30,1994
Cynthia Russell	Senior Secretary	September 30, 1994
Gerald Hoo Fung	Development Manager	September 30, 1994
Sylvia Moore	Senior Executive Secretary	September 30, 1994"

This evidence suggests that there was also compliance with (5) (2) (a) of the Act.

The respondent Fiscal Services, did not adduce any evidence at the trial. Mr. Hamilton, for the respondent submitted in the court below that:

> "(4) The plaintiff has not shown that his dismissal by the defendant was as a result of redundancy."

Ellis J. was impressed by this submission for he found:

> "(2) The plaintiff has not proven that his dismissal was because of redundancy. He is therefore not entitled to the sum of $135,240 as redundancy payment."

To my mind the learned judge came to the wrong conclusion. The appellant made out his case on a balance of probabilities, because he demonstrated that no one was employed in the department for approximately one year. Before the appellant's dismissal the number of employees was reduced from nine to one. He is therefore entitled to $135,240 for redundancy as claimed.

Was the Lease - back agreement governed by the HirePurchase Act?

To appreciate the submission on this aspect of the case it is necessary to examine the averments in paragraphs 13-16 in the Statement of Claim. They were as follows:

> "13. On or about December 3, 1991 the Plaintiff and the Defendant entered into what was styled by the Defendant as a Lease-back Agreement, whereby the Defendant leased to the Plaintiff a Fiat Tipo DGT motor car for a period of 5 years at a monthly fee of $4,300.00, which agreement granted to the Plaintiff an option to purchase the said motor car after an expiration of 5 years, for a purchase price equal to the price of the car less the amount paid by the plaintiff under the agreement.
>
> 14. Pursuant to the said Lease-back Agreement the Defendant made monthly deductions from the Plaintiff's salary of $4,300.00 for a period of 31 months until the termination of the Plaintiff's employment as aforesaid at which time a total sum of $133,300.00 was deducted by the Defendant from the Plaintiff's salary on account of the motor car.
>
> 15. On or about July 2, 1994 following the Plaintiff's termination, the Defendant wrongfully repossessed the said motor car.
>
> 16. The Plaintiff says that the said Lease-back Agreement was in fact a hire-purchase agreement, that the Plaintiff at the time of repossession of the motor car was not in default thereof with respect to any payments and that no statutory or any notices was given to the Plaintiff by the Defendant prior to the repossession and as such the Plaintiff says that he is entitled, in accordance with the provisions of the Hire-Purchase Act, to the refund of the sums of $133,300.00 which he paid on account of the motor car."

Then the claim for its recovery is stated thus:

> "(d) The sum of $133,300.00 paid by the Plaintiff to the Defendant pursuant to the Lease-back Agreement dated December 3, 1991."

As for the evidence pertinent to these averments it reads thus:

> "Car was taken from me by a Bailiff days after 14.6.94.
>
> I had paid $133,300 on Lease back arrangement at $4,300 per month."

It is now necessary to examine the clauses of the Lease-back agreement. The recitals are as follows:

> "LEASE-BACK AGREEMENT
>
> THIS AGREEMENT is made this 3rd day of December, One Thousand Nine Hundred and Ninety One (1991), BETWEEN FISCAL SERVICES (EDP) LIMITED, a company incorporated under and by virtue of the Companies Act and having its registered office at the Kingston Mall, 12 Ocean Boulevard, in the parish of Kingston (hereinafter called "the owner") of the ONE PART and MANLEY MICHAEL HAYE of 22 Laura Drive, Ensom City, in the parish of St. Catherine employed by Fiscal Services (EDP) Limited as Director of Audit & security (hereinafter called 'the hirer') of the OTHER PART."

Then the initial paragraph of the operative part of the agreement reads:

> "WHEREBY IT IS AGREED AS FOLLOWS;
>
> 1. The owner will let and the hirer will take on hire upon the terms and conditions hereinafter mentioned the motor vehicle more particularly described in the Schedule hereto.
>
> 2. The hiring shall continue for a period of five (5) years from the date hereof unless determined in the manner hereinafter appearing."

As regards the method of payment paragraph 3 provides that:

> "3. The hirer shall pay to the owner at the end of every calendar month of the Agreement the sum of Four Thousand Three Hundred Dollars ($4,300) the first of such

> payments to be made on the 31st day of December, One Thousand Nine Hundred and Ninety One (1991) and to effect such payments the hirer hereby authorizes the owner to deduct from his salary or other emoluments the said sum of Four Thousand Three Hundred Dollars ($4,300) at the end of every month of this agreement and apply the same in satisfaction of the hirer's obligation herein."

One method of terminating the agreement is stipulated in clause 7(c). Clause 7 reads:

> "7. The hirer shall not during the continuance of the hiring –
>
> (a) sell, assign, pledge, mortgage, charge, sub-hire, part with possession of or otherwise deal with the motor vehicle or any interest therein (or in this Agreement);
>
> (b) allow any lien on the motor vehicle whether for repairs charges, expenses of storage or otherwise to be created.
>
> (c) be without a valid contract of employment with the owner."

So Clause 7(c) above is specific to the contract of employment.

Clause 11 is most important. It states:

> "11. The owner hereby grants to the hirer the option to purchase the said motor vehicle after five (5) years of the execution of this Agreement, acceptance to be communicated in writing to the Managing Director of Fiscal Services (EDP) Limited."

It is now necessary to examine the relevant provisions of the Hire-Purchase Act (the "Act"). Section 2(1), in so far as material, reads:

> "hire-purchase agreement" (subject to subsection (6)) means an agreement for the bailment of goods under which the bailee may buy the goods, or under which the property in the goods will or may pass to the bailee."

As the appellant is a bailee of the motor vehicle and the respondent the bailor the fundamental relationship of the parties falls within the ambit of the above definition. Then there is particularisation in the definition section. Hirer and owner are defined thus:

> "hirer" means the person who takes or has taken goods from an owner under a hire-purchase agreement and includes a person to whom the hirer's rights or liabilities under the agreement have passed by assignment or by operation of law.
>
> "owner" means the person who lets or has let goods to a hirer under a hire-purchase agreement and includes a person to whom the owner's property in the goods or any of the owner's rights or liabilities under the agreement has passed by assignment or by operation of law."

In this regard the appellant qualified as the hirer and the respondent as the owner.

There is a contract of employment between the parties and there is a reference to it in the Lease-back Agreement in clause 7 (c) supra. Section 2(6) of the Act states that it is to be read as one with the Lease-back agreement. Section 2(6) of the Act reads:

> "(6) Where by virtue of two or more agreements, none of which by itself constitutes a hire-purchase agreement as defined by subsection (1), there is a bailment of goods and either the bailee may buy the goods, or the property there-in will or may pass to the bailee, the agreement shall be treated, for the purposes of this Act, as a single agreement made at the time when the last of the agreements was made."

This section of the Act demonstrates that Clause 7(c) of the Lease-back Agreement combined with the contract of employment are governed by the provisions of the Hire Purchase Act. So it is appropriate to turn to Part III of that Act to ascertain the right of the appellant to recover the payments he made since by Clause 10 (supra) of the contract of the employment he was given notice of termination and no longer had a valid contract of employment pursuant to clause 7(c) of the Lease-back agreement. In

this case the respondent recovered the motor vehicle by retaining the services of a Bailiff. The relevant provisions of Part III of the Act read:

> PART 111. Recovery of possession and other remedies
>
> 24.-(1) Save as permitted by this Part, a vendor, under a hire-purchase agreement or a conditional sale agreement, shall not enforce otherwise than by action any right to recover possession of goods pursuant to any provision of the agreement.(Emphasis supplied)
>
> (2) If a vendor recovers possession of goods in contravention of subsection (1), the agreement, if not previously terminated, shall terminate and –
>
> (a) the purchaser shall be released from all liability under the agreement and shall be entitled to recover from the vendor, in an action for money had and received, all sums paid by the purchaser under the agreement or under any security given by him in respect thereof; and
>
> (b) any guarantor, in relation to that agreement, shall be entitled to recover from the vendor in an action for money had and received, all sums paid by the guarantor under the contract of guarantee or under any security given by him in respect thereof."

The learned judge found:

> "(1) The plaintiff is not entitled to a refund of $133,300 which he paid under the Lease-back Arrangement. He had the user of the vehicle and he was afforded the wherewith to pay for that user."

Based on the foregoing section, Ellis J. erred since the respondent recovered the motor vehicle otherwise than by action in contravention of Sec. 24(1) of the Act. Sec. 24(2) could be invoked. The latter section entitled the appellant to secure all sums paid pursuant to the Lease-back agreement before his dismissal. Therefore the appellant is entitled to $133,300.00 as claimed.

Ought the appellant to pay for the loss of a pager?

The learned judge below found that:

> "(3) The plaintiff did not report the loss of the "pager" to the police as he alleged. I hold on a balance of

> possibilities, that the report of its loss was not made to the defendant until 6 months after the alleged loss."

This finding was in response to the appellant's claim for:

> "(b) The sum of $10,000.00 for a stolen pager that was wrongfully deducted by the Defendant/Respondent from the Plaintiff/Appellant termination package."

The finding of the learned judge was unreasonable in the light of the evidence.

The appellant's evidence disclosed that on May 31,1993, the motor vehicle assigned to him under the Lease-back Agreement broke down on the road and a beeper, the property of the respondent, was stolen. That was not in dispute. What is in dispute is whether the loss was reported firstly to the police, and secondly to the respondent shortly after the loss. The police say that loss was not noted in their records. The following letter of May 5, 1994, is of importance:

> "Dear Mr. Haye,
>
> Having reviewed the correspondence arising out of the lost pager assigned to you, I must bring to your attention the following:
>
> 1) Fiscal Services (EDP) Limited was not informed of the loss until six months later when we tried to return the pagers to Tonicraft.
>
> 2) We have also paid rental and insurance for the pager for the period June 1 to November 30, 1993, when you were not in possession of the pager.
>
> 3) You indicated that a report was made to the Matilda's Corner Police.
>
> 4) An official report from the Matilda's Corner Police station revealed that their records indicate no such report.
>
> In light of the above circumstances we are requesting that you accept responsibility for the costs incurred, as billed by Tonicraft. Please see copies of invoices attached.
> Kindly indicate your method of payment as soon as possible or we will have no alternative but to deduct this amount from your next salary.

Awaiting a response.

Yours sincerely,

Terrence Frater
Director – Finance & Administration"

A later letter of May 24, 1994 this time from Roy A. Headley suggests the loss of the beeper was reported to the police three weeks after the motor car broke down and the beeper was stolen. Here is the letter:

"May 24, 1994

Dear Mr. Haye:

> I am writing with reference to your recent telephone call in which you stated that you had given a statement to the Matilda's Corner Police Station approximately three weeks after you reported the loss on May 30, 1993, of the Beeper which was assigned to you by Fiscal Services (EDP) Limited.
>
> While FSL on its part will endeavour to verify the date on which the statement was given, any assistance you can provide in helping us with the actual date when it was given will be appreciated.

Yours sincerely

Roy A. Headley
Acting Managing Director."

Be it noted that there was no attempt to deny that the loss of the beeper was reported around the end of May and the commencement of June. The report should have been made to the insurance company at that time. The management could also have reported to the police at that time as well. An aspect which should be emphasized is that the above letter makes no reference to the earlier letter of May 5th 1994. The right hand of the Managing Director ought certainly to know what the left hand of the Director, Finance and Administration had written.

The evidence of the appellant on this issue is positive. It runs thus:

> "Sometime in 1993 a Beeper was stolen from me. Last day in May 1993 I radioed for assistance. Car would not start. Car was left on the road. The following morning I found car had been broken into and things stolen included

> Beeper. Managing Director was informed 1/6/93 and 9/6/93.
>
> In a letter I received it said a report had been made to police. I have no control over police books. Frater reported to Headley. Mrs. Crawford was
> Cost of Pager was deducted from final pay."

Then on January 22nd 1996, Lorenso Grant the Acting General Manager of the respondent gave this answer to interrogatories:

> "5. In answer to the third interrogatory, namely "What agreement or authorization did the Defendant rely on in deducting the sum of $10,000.000, for the rental of the stolen pager, from the Plaintiff' termination pay?" I say that the Company's Policies and Procedures manual states that "The company reserves the right to deduct from terminal benefits any amounts owed by the employee to the company. Where termination is due to dishonesty or willful destruction of company property, payments may be withheld pending investigation of the loss to the company."

In reviewing this evidence I find that on a balance of probabilities the loss of the Pager was reported to the Managing Director not later than three days after it was stolen. The respondent had ample time to inform their insurers of the loss.

Conclusion

In the light of the foregoing, the appeal must be allowed. The order below must be set aside the appellant is entitled to receive $135,240.00 as compensation for redundancy and $133,300.for the recovery of payments under the Lease-back Agreement and the sum of $10,000.00 wrongfully deducted from the appellant's terminal package. Interest at the rate of 15% per annum from the 8th November 1994 to 1st. February 2001, on the total sum that is due to the appellant. The appellant should have the agreed or taxed costs both here and below.

HARRISON,JA.

I agree.

LANGRIN, JA.

I agree.