JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CIVIL APPEAL NO. 14/07

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE MORRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.

BETWEEN	**HOLIDAY INN SUNSPREE RESORT**	**APPELLANT**
AND	**DOTHLYN PENNICOT**	**RESPONDENT**

Trevor Ho-Lyn for the appellant.

Respondent absent and unrepresented.

September 29, 2008 and December 18, 2009

SMITH, J.A.

I have read the judgment of my brother Dukharan, J.A. I agree with his reasoning and conclusion and have nothing to add.

MORRISON, J.A.

I too agree with the judgment of my brother Dukharan, J.A.

DUKHARAN, J.A.

1. This is an appeal arising from the decision of the learned Resident Magistrate for the parish of St. James made on October 10, 2006, when she found that the

respondent (the claimant in the Court below) was entitled to a sum of $126,240.26 for overtime payment and $7,000 for redundancy payment. A stay of the judgment was granted on February 13, 2007 pending the appeal.

2. The respondent, Dothlyn Pennicot was employed as a security guard by the appellant from June, 1997 to October, 2001 when her employment was terminated. She brought an action against the appellant claiming $126,240.26, representing overtime worked during the period. She also claimed $7,000 redundancy pay for the termination of her employment. There is no dispute between the parties in relation to the period of employment. The appellant contends that the respondent has already been paid for overtime worked and is not entitled to redundancy payment.

3. The respondent stated, in evidence, that when she commenced employment with the appellant, she signed an agreement in relation to her salary and gratuity. She was orally informed that she was required to work eight hours per day and six days per week totalling forty-eight hours. The overtime worked would be paid at time and a half. Insurance, health and other benefits were explained to her.

4. The respondent claimed that her first salary statement detailed the hours worked as forty hours. However, forty eight hours was recorded in the payroll roster and payroll book. This continued for some time until this discrepancy was raised at a departmental meeting. The respondent said that the Human Resources Manager, Mr. Ray Howard, failed to address the issue. Subsequently, the issue was again raised at a meeting when the general manager, who was present, gave Mr. Howard instructions to

look at the discrepancy. The respondent's next salary statement now recorded forty-eight hours as regular pay and not forty. She stated that the hours for gratuity were also increased. The hourly rate of pay was reduced and she still received the same pay. She said, over the years, her flat salary was increased but she was not paid for the overtime worked. The respondent also said in evidence that while working with the appellant over a period of four years and four months, she signed several six monthly contracts, after returning from two weeks paid vacation leave. It is her contention that her employment was continuous over that period of time until her contract was terminated and therefore she is entitled to redundancy pay.

5. Mr. Ray Howard, the Human Resource Manager for the appellant, gave evidence to the effect that if security guards worked more than forty hours, the extra hours would be overtime worked, to be paid at time and a half. He said a wage package was worked out to reflect overtime pay. The respondent, he said, was paid above the minimum wage and was paid a guaranteed gratuity, and was informed that she would be required to work forty-eight hours. He said there were contracts of employment that lasted for six months, after which the respondent was sent off on a contract break. This continued for the four years the respondent worked with the hotel. Mr. Howard admitted that there were departmental meetings with the security guards about the payment of overtime. He said he was unaware that from June, 1997 to May, 1998, forty hours regular pay was on the respondent's salary statement. He admitted that the respondent was entitled to overtime for which she had been paid.

6. It was the finding of the learned Resident Magistrate that there was evidence to support the respondent's claim that she worked and was not paid for overtime from 1997 to 2001. It was also the finding of the learned Resident Magistrate that the period of employment was continuous and the respondent was entitled to redundancy payment.

Grounds of Appeal and Supplemental Grounds of Appeal

7. Several grounds of appeal were argued by Mr. Ho-Lyn, counsel for the appellant. They are as follows:

(a) That the learned Resident Magistrate erred in law when she interpreted the provisions of the Minimum Wage Act and the Minimum Wage Act Regulations as providing that any hours worked over 40 hours per week by a private/proprietary security guard were overtime hours.

(b) That the learned Resident Magistrate erred in law in her interpretation of section 3 of the Employment (Termination and Redundancy Payments) Act when she held that the Plaintiff/Respondent had been continuously employed although, on the evidence, the Plaintiff/Respondent had a break between each 6 monthly contract of employment.

(c) That the learned Resident Magistrate erred in law in her interpretation of section 10 of the Employment (Termination and Redundancy Payments) Act when she held that the Plaintiff/Respondent was entitled to redundancy payment.

(d) That the learned Resident Magistrate erred in law in her interpretation of the provisions of the Limitations of Actions Act in relation to the time for filing the claim for overtime pay due under a contract of employment when she held that time did not run by virtue of the fact that the Plaintiff/Respondent continued to work for the Defendant/Respondent until 2001 and the claim filed in 2004 for overtime pay due for the period in excess of six years was not barred by the statute.

Supplemental Ground of Appeal

(1) The learned Magistrate erred on a matter of law in placing reliance on documentary evidence that was inadmissible to determine the proving of a fact in issue, namely the actual hours of overtime worked by the Respondent.

8. It was submitted by Mr. Ho-Lyn in ground (a), that the learned Resident Magistrate, in considering the Minimum Wage Act, failed to make a distinction between proprietary security guards and industrial security guards. The Act, he submitted, deals only with industrial security guards, as the regulations do not refer to proprietary security guards, a group under which the respondent falls. He further submitted that there was no prescribed minimum wage for proprietary guards as opposed to industrial guards. It was also his submission that the respondent was being paid a flat rate which included the overtime payment. He said the respondent was unable to prove the days she worked overtime.

9. In ground b, it was submitted by counsel that there was no continuous employment of the respondent and consequently she was not entitled to redundancy payment. Counsel cited section 4 (5) of The Employment (Termination and Redundancy Payments) Act Regulations which reads:

> "If after an interval of not more that two weeks after the ending of an employee's contract of employment, his employer renews his contract or re-engages him in accordance with paragraph (b) of subsection (6) of section 5 of the Act, the period of that interval shall count as a period of employment."

Counsel further submitted that on an examination of the contracts of employment which were tendered and admitted in evidence, except for two, none of the periods between the expiration of the old contract and the commencement of the new contract, was within the terms required by law for the employment to be construed as continuous.

10. It was the submission of counsel in ground c, that the learned Resident Magistrate erred in the interpretation of section 10 (1) of the Employment (Termination and Redundancy Payments) Act which provides that:

> "(1) Notwithstanding anything in the preceding provisions of this Part an employee shall not be entitled to a redundancy payment unless, before the end of the period of six months beginning with the relevant date –
>
> (a) the payment has been agreed; or
>
> (b) the employee has made a claim for the payment by notice in writing given to the employer; or
>
> (c) proceedings have been commenced under this Act for the determination of the right of the employee to the payment or for the determination of the amount of the payment."

Counsel further submitted that the requirement of section 10 must be specifically proved. The respondent gave no evidence that she sent or delivered any such claim within the required time.

11. In ground (d), it was submitted by counsel that the claim for overtime payment for periods prior to September 23, 1998 would be barred by virtue of the Limitation Act. It was the finding of the learned Resident Magistrate, that time did not run by virtue of the fact that the respondent continued to work for the appellant until 2001, and the claim filed in 2004 for overtime pay due for periods in excess of six years was not barred by statute. Counsel further submitted that since there were separate contracts of employment for each contractual work period of six months, any sum due in respect of a contract would become due during the tenure of that contract and ought to be sued for within the six year period after it should have been paid.

12. On the supplemental ground, it was submitted by counsel that the learned Resident Magistrate received into evidence, photocopies taken of a payroll book. There was no proper accounting for the originals; neither was the maker of the document called to explain what the document represented and the basis on which it was created. The learned Resident Magistrate also placed reliance on the contents therein as proof of the issue that the salary paid to the respondent was for forty hours. Counsel relied on Section 31 G of the Evidence Act which provides that:

> "A statement contained in a document produced by a computer which constitutes hearsay shall not be admissible in any proceedings as evidence of any fact stated therein unless –
>
> (a) at all material times –
>
> (i) the computer was operating properly;

(ii) the computer was not subject to any malfunction;

(iii) there were no alterations to its mechanism or processes that might reasonably be expected to have affected the validity or accuracy of the contents of the document;

(b) there is no reasonable cause to believe that -

(i) the accuracy or validity of the document has been adversely affected by the use of any improper process or procedure or by inadequate safeguards in the use of the computer;

(ii) there was any error in the preparation of the data from which the document was produced;

(c) the computer was properly programmed;

(d) where two or more computers were involved in the production of the document or in the recording of the data from which the document was derived—

(i) the conditions specified in paragraphs (a) to (c) are satisfied in relation to each of the computers so used; and

(ii) it is established by or on behalf of the person tendering the document in evidence that the

> use of more than one computer did not introduce any factor that might reasonably be expected to have had any adverse effect on the validity or accuracy of the document."

Counsel further submitted that no evidence whatsoever was given which could amount to compliance with these provisions and therefore the computer-generated earnings statements were inadmissible to prove the hours worked by the respondent. The respondent gave no oral evidence of any actual overtime hours worked.

The Issues

13. The issues to be determined are whether the respondent is entitled to overtime payments and whether she is entitled to redundancy payments. The learned Resident Magistrate found that the respondent was entitled to both.

14. There is no dispute that there was a written contract between the parties that formed the basis of the contractual relationship between the parties. A perusal of the contracts does not specify any hours of work and only the salary is stated. The contracts were for a period of six months. The respondent stated in evidence that she was orally informed that she was required to work eight hours per day and six days per week totalling forty eight hours. It is clear from the contract of employment (exhibited) that not all the terms and conditions worked out by the appellant were contained in it. The appellant contends that the package worked out reflected overtime pay and a flat salary which included the forty eight hours worked.

15. The evidence of Mr. Ray Howard on behalf of the appellant, is that prior to the signing of contracts, there were concerns in the security industry regarding time worked over forty hours, and so as part of the respondent's contract, they arranged a package for forty eight hours and the respondent would be paid overtime for the extra time over forty hours. The respondent was paid above the minimum wage, plus a guaranteed gratuity.

16. The Minimum Wage Act Regulations, section 4 provides for the minimum wage for industrial security guards as follows:

> "The minimum wage for industrial security guards is hereby fixed at the rate of –
>
> (a) $117.50 per hour for work done during any period not exceeding –
>
> (i) 8 hours on a normal day; or
>
> (ii) 40 hours in any week;
>
> (b) $176.25 per hour for work done during any period in excess of 8 hours on a normal working day or in excess of 40 hours in any week;
>
> (c) $235 per hour for work done during any period on a rest day or a public holiday."

The respondent comes under the Private Security Regulation Authority Act. The learned Resident Magistrate in my view, and I do agree with counsel for the appellant,

failed to make that distinction and considered that the provisions of the Minimum Wage Act relating to "industrial security guards" applied to the respondent.

17. The respondent explained in evidence that from June, 1997 to May, 1999 her salary statement reflected forty regular hours but after it was brought to the attention of the general manager, it read forty eight regular hours. This was explained by the appellant as a computer glitch. The learned Resident Magistrate seemed to have relied on the fact that the forty hours on the earning statement was proof of the fact that the pay stated was for forty hours.

18. In **Armstrong Rolls Ltd. v Mustard** [1971] 1 All ER 598 the contract of employment required the employee to work forty hours per week. He was then asked to work for sixty hours per week in order to ensure twenty four hours coverage of the plant. He did this for seven years, and when made redundant, it was held that his contract of employment had been varied so that he was entitled to a redundancy payment on the basis of a sixty hour week. In the instant case, the terms agreed by both parties at the commencement of the agreement were for a forty eight hours week. This was admitted by the respondent in evidence (at page 2 of the notes of evidence) when she said:

> "My understanding before I started work, my hours of work was 6 days per week 8 hours per day. The arrangement for these hours I was to be paid a flat salary."

19. It seems to me that the learned Resident Magistrate came to the conclusion that the forty hours reflected on earlier pay slips (before being corrected) was proof of the

fact that the contract was for forty hours per week. In my view, the learned Resident Magistrate erred when she failed to consider the understanding of the parties that the contract of employment was for forty eight hours per week for which the respondent was paid a flat salary to cover the period. There is no evidence to suggest that the respondent was not paid for overtime work done in excess of forty eight hours. In my view, the appellant succeeds on this ground.

20. The complaint that the earning statements exhibited were generated by a computer and that section 31 G of the Evidence Act (supra) was not complied with has some merit. Panton, J.A. (as he then was) in dealing with the requirements of section 31 G in **David Chin v Regina** RMCA No. 1/2000 delivered on the 31st July, 2001 at p. 24 said:

> "These requisites also have to be satisfied for a statement to be admissible, where it is contained in a document produced by a computer even though that statement does not constitute hearsay. The computer evidence admitted at the trial did not satisfy the conditions specified in this Act. Accordingly by itself, it could not properly form the basis for proof of guilt."

21. It is quite clear in the instant case that the learned Resident Magistrate did not consider that the requirements of section 31G ought to have been looked at conjunctively and that all aspects of the section must be satisfied. However, it should be noted that even if the section was complied with, that would not detract from the fact that the learned Resident Magistrate erred in finding that the respondent was entitled to claim overtime payments.

22. As to the entitlement to redundancy payments, section 4 (5) of the Employment (Termination and Redundancy Payment) Act Regulations is worth repeating. It reads:

> "If after an interval of not more than two weeks after the ending of an employee's contract of employment, his employer renews his contract or re-engages him in accordance with paragraph (b) of subsection (6) of section 5 of the Act, the period of that interval shall count as a period of employment."

In this case, there was a six months contract of employment. It is therefore necessary to look at the period which elapsed before the renewal or re-engagement of the respondent to determine whether or not there was continuous employment and an entitlement to redundancy payment. It is quite clear that if, after an interval of not more than two weeks after the ending of an employee's contract of employment, his employer renews his contract, the period of that interval shall count as a period of employment.

23. A perusal of the contracts that were exhibited revealed that, with the exception of two on the face of it, none of the periods between the expiration of the old contract and the commencement of the new contract was within the two week period as required by law for the contract to be regarded as continuous. It was the finding of the learned Resident Magistrate that the respondent's paid vacation leave was for no more than two weeks at the end of the six months contract. In addition, she was paid Christmas bonus and worked for four years and four months. It was also the finding of the learned Resident Magistrate that the respondent's employment was continuous in

excess of two years. It seems to me that with the paid vacation leave for two weeks after each contract of employment, the contracts appear to have been renewed over the years after an interval of approximately one week. The termination of employment letter (Exhibit 1) clearly states that the respondent's employment with the appellant was at an end in October 2001. The learned Resident Magistrate was, in my view, correct when she found that the respondent was in continuous employment in excess of two years and therefore entitled to redundancy payment and that the cause of action was within the three year limit.

24. The complaint that the claim for redundancy was not made within the six months time limit, in accordance with section 10 of the Employment (Termination and Redundancy Payment) Act, is in my view, without merit. The evidence indicates that the appellant was so advised within three months after the letter of termination.

25. Accordingly, the appeal is allowed in part. The appeal in respect of the claim for overtime payments is allowed. The appeal in respect of the claim for redundancy payments is dismissed. Half costs to the appellant to be taxed, if not, agreed.

SMITH, J.A.

ORDER:

Appeal is allowed in part. The appeal in respect of the claim for overtime payments is allowed. The appeal in respect of the claim for redundancy payments is dismissed. Half costs to the appellant to be taxed if not agreed.