

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW & EQUITY DIVISION
2013/COM/lab/0062

BETWEEN

NIKITA BOSTWICK-MILLER

Plaintiff

AND

MINISTRY OF EDUCATION

1st Defendant

AND

THE ATTORNEY GENERAL

2nd Defendant

Before: The Honourable Madam Justice Tara Cooper Burnside (Ag)

Appearances: Sydney Campbell and Mr. Cyril Ebong for the Plaintiff

Kenria Smith for the Defendants

Hearing Dates: 1 December 2020, 20 January 2021

JUDGMENT

Introduction

[1] On 29 August 2013, the Plaintiff commenced this action against the Defendants by a generally indorsed Writ of Summons, claiming general damages in the amount of \$16,312.50, special damages, damages for breach of statutory duty and breach of contract, costs and interest. The indorsement on the Writ states:

“THAT THE PLAINTIFF’S CLAIM is for general and special damages arising out of a breach of the employment contract whereby the

Defendants failed to provide the Plaintiff with the salary owed to her for the period of June A.D. 2011 to October A.D. 2012.

As a result of the 1st Defendant's negligence, the Defendants [sic] has breached their duty of care and or statutory duty to pay the Plaintiff's wages and therefore the Plaintiff has suffered loss and damage."

Background

- [2] By way of background, the Plaintiff commenced employment in the public service as a janitress pursuant to a letter of appointment dated 26 June 2006. Her employment became effective on 3 January 2006 and was expressed in the appointment letter to be on a temporary month to month term at a salary of \$10,100 per year, for a period of one year in the first instance.
- [3] Due to personal and medical reasons, in May 2011, the Plaintiff requested to be granted a leave of absence. She alleges that the First Defendant failed to pay her salary for the period June 2011 to September 2012 while she was on leave because her salary had been coded while she was on leave. According to the Plaintiff, the First Defendant coded her salary in May 2013, and she has not been paid or permitted to return to work since that date.
- [4] The Plaintiff particularises her claims against the Defendants in her Statement of Claim filed on 18 June 2014. In summary, she pleads that she was injured in August 2006 in a slip and fall accident while at work and was diagnosed with Lumbar radiculopathy by Dr Valentine Grimes in about 2008 and later with a herniated disc; and was required to undergo surgery. She pleads that she requested leave because of the pain she was suffering and because she received medical advice that she should not return to work until the surgery was completed. And that she could not return to work until September 2012 because her surgery was postponed. Further, she pleads that the First Defendant was negligent and acted in breach of contract and/or the terms of an industrial agreement and their statutory duty when they failed to pay her salary from July 2011 to October 2012 (a period slightly different from the period referred to in her Writ) and did not permit her to return to work.
- [5] Additionally, although in her particulars of breach of contract she pleads that she was "currently still employed" with the First Defendant, in her particulars of breach of statutory duty, the Plaintiff alleges that she was constructively, wrongfully and/or unfairly dismissed because she was not permitted to return to work in or about August 2013.
- [6] In their Defence filed 24 September 2013, the Defendants admit that the Plaintiff was not paid from July 2011 to September 2012 but deny that they were negligent

and/or breached the terms of the Plaintiff's contract of employment or the industrial agreement. They also deny that the Plaintiff has been wrongfully or unfairly dismissed or that they acted in breach of their statutory duty. The Defendants' position, as averred in their Defence, is that the Plaintiff was absent without leave for a long period of time without furnishing the requisite medical certificates and that her salary was coded for the times she was absent without leave. The Defendants also plead that, because of the Plaintiff's unauthorised absences from work and her failure to show cause as to why she should not be dismissed, a recommendation for her dismissal was made in about August 2013.

Issues

- [7] The primary questions for the Court to determine are (i) whether the Defendants wrongfully withheld the Plaintiff's salary for the period June 2011 to September 2012 and (ii) whether the Plaintiff has been unfairly and constructively dismissed.

Evidence

- [8] The Plaintiff gave evidence at the trial. Antoinette Clarke, an Office Manager III attached to the Human Resources Department in the Ministry of Education, gave evidence on behalf of the Defendants. The Plaintiff's evidence-in-chief was contained in a witness statement filed on 3 November 2020 and Ms Clarke's evidence in chief was contained in an Affidavit filed on 30 June 2020.
- [9] In addition to the oral testimony, documentary evidence was presented to the Court by way of an Agreed Bundle of Documents filed on 27 November 2020 (the "Agreed Bundle").
- [10] The relevance and significance of a document contained in an agreed bundle will usually only become apparent when witnesses who are called to testify at trial are referred to the document and give secondary evidence regarding its contents. In the present case, very few of the documents contained in the Agreed Bundle were put to the witnesses or proved by secondary evidence. In the result, the Court was left with little assistance regarding the relevance of most of the documents contained in the Agreed Bundle, and the weight to be accorded to them.

Did the Defendants wrongfully withhold the Plaintiff's salary for the period June 2011 to September 2012?

- [11] In her evidence in chief the Plaintiff began her account of the events with an assertion that she sustained serious injuries to her lower back and bladder during a slip and fall accident while at work on 16 August 2006. She asserted that her injuries warranted medical attention and surgery and that, because of the pain she was suffering, she was compelled to request a leave of absence to seek

medical attention. She also stated that such leave was initially denied but later granted after she produced medical certificates. Notably, no doctor was called to provide any medical evidence on behalf of the Plaintiff. In addition, although the Court notes that there are letters from various physician's contained in the Agreed Bundle which indicate that the Plaintiff received medical treatment for lower back pain and other ailments, the witnesses at trial were not referred to any of them.

[12] There is also no evidence that the Plaintiff sustained injuries to her lower back and bladder on 16 August 2006 while she was at work. Based on Ms Clarke's evidence, which I accept, and the Janitorial Staff List exhibited to Ms Clarke's Affidavit for the week of 14 August 2006, the Plaintiff was absent from work on 16, 17 and 18 August 2006. Furthermore, her claim to be entitled to a national insurance industrial accident benefit was denied for lack of proof that the Plaintiff was in fact at work on the date of the alleged accident.

[13] In her evidence in chief the Plaintiff also asserted that the First Defendant failed to pay her the sum of \$13,821.76 for the period June 2011 to September 2012 because it had coded her salary.

[14] The said sum of \$13,821.76 is approximately \$2,500 less than the sum claimed in the Plaintiff's Writ, but the First Defendant does not deny that the Plaintiff was owed that sum. While cross-examining the Plaintiff, Ms Smith suggested that the Plaintiff was not paid the sum of \$13,821.76 because she was indebted to the First Defendant for a sum exceeding that amount. She also put to the Plaintiff a letter issued to her by the Director of Education dated 19 February 2013 by which she was informed that that she was indebted to the Government of The Bahamas for the overpayment of her salary in the amount of \$21, 237.48.

[15] Ms Smith also put to the Plaintiff a second letter dated 19 February 2013 issued by the Director of Education to the Plaintiff in the following terms:

"...Please be advised that Mrs. Bostwick-Miller is indebted to the Government of The Bahamas as follows:-

seven-eighths (7/8^{ths})	-	\$ 1,057.10
half pay leave	-	\$ 5,607.08
unpaid leave	-	<u>\$14,663.30</u>
		Total
		-

\$21,327.48

For the period July 2011 to June 2012 she is owed a sum of \$13,821.76 which will be deducted from the owing amount of \$21,327.48 leaving her with an owed balance of \$7,505.72. The Accounts section has advised that this will be recovered for a period of forty-eight (48)

months at \$178.71 per month commencing February 2013.”

[16] The Plaintiff’s evidence with respect to that letter is set forth below:

“Q. I put it to you that you are indebted to the Government of The Bahamas and you are seeking to recoup monies that are not owed to you. Is that not so?

A. No, ma’am.”

[17] No explanation was provided by the Plaintiff as to why she disagreed with Ms Smith’s suggestion and there was no re-examination by the Plaintiff’s Counsel on this point.

[18] In her evidence-in-chief Ms Clarke stated that the Plaintiff requested a leave of absence “due to personal and medical reasons”, by letters dated 10 May 2011, for various periods between May 2011 and January 2013, some of which overlapped.

[19] In this regard, Ms Clarke referred to five letters by which the Plaintiff requested a leave of absence. Notably, each letter is dated 10 May 2011; although they are stamped as having been received by the Ministry of Education’s Human Resources Department on various dates. Further, except for the period of leave requested, each letter is in the exact same terms as follows:

“To Whom It May Concern:

**I would like to request a leave of absence for the period of [X] to [X].
Due to personal and medical reasons beyond my control.**

I hope to get a favourable respond [sic] in this regard, because I really need this leave.

Thank you for your help.”

The periods of leave requested and the date each letter was stamped as received are set forth below

Letter Date	Leave Period Requested	Receipt Date
10 May 2011	16 May 2011 to 02 Aug 2011	10 May 2011
10 May 2011	10 May 2011 to 17 Oct 2011	10 May 2011
10 May 2011	18 Oct 2011 to 17 Jan 2012	07 Oct 2012
10 May 2011	17 Jan 2012 to 23 July 2012	15 Feb 2012
10 May 2011	23 July 2012 to 28 Jan 2013	10 Jun 2013

[20] As may be seen, the period of requested leave is significant, i.e., approximately 20 months.

[21] Ms Clarke stated that the Plaintiff's salary was coded to avoid any further overpayment of salary. She also stated that a review of the Plaintiff's file discovered that there were no salary deductions for the Plaintiff's absences since September 2007; and the Plaintiff had received her full salary even though her absences were not covered by the medical certificates she provided. According to Ms Clarke, once the Plaintiff's salary was coded "she would then submit medical certificates or proceed on unpaid leave again".

[22] In her evidence Ms Clarke referred to a letter issued to the Plaintiff by the Director of Education on 13 November 2012 regarding her attendance at work for the years 2006 to 2012. That letter informed the Plaintiff of the date when her sick leave entitlement was exhausted in each year during the period 2006 to 2011. And for the year 2012, the letter requested the Plaintiff to provide medical certificates to cover certain periods when the Plaintiff was absent and indicated that for certain of her absences, she could elect to receive seven-eighths pay or for them to be treated as vacation leave. However, there is no evidence that the Plaintiff responded to this letter.

[23] Leaves of absence are provided for in Section 15 of the General Orders promulgated by the Public Service Commission. The relevant provisions for present purposes are set forth below.

"Vacation Leave and Leave of Absence

...

1503. Leave of absence on half pay may be granted on the same scale and in respect of the same period as vacation leave.

1504. Vacation leave may be accumulated in respect of any period not exceeding three (3) years. Leave of absence (on half (1/2) pay) may be accumulated in respect of any period not exceeding six (6) years. The total amount of accumulated vacation leave and leave of absence which may be taken together at any one time shall not exceed twenty-four (24) weeks. Only in very exceptional circumstances, and with the express permission of The Deputy Prime Minister, shall any officer be allowed to exceed the maximum accumulation of leave allowed in this General Order. Accordingly, the following maximum amounts of leave may be accumulated:

Scale	Maximum eligibility for Vacation Leave (3 Years)	Maximum eligibility for Leave of Absence on half pay (6 Years)
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...

\$10,700 to	9 weeks	18 weeks
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\$20,499 p.a. (3 weeks p.a.) (3 weeks on half pay p.a.)

...

1509. An officer who absents himself from his station, or; his duties without leave, or; who, without an acceptable excuse fails to resume duty when he is due to do so, will be regarded as absent without permission and without pay. A period of absence may not be set off against any leave eligibility. It is the duty of the Head of Department to report to his Permanent Secretary the failure of an officer to report for duty after leave, or; the absence of any officer from duty without permission.

...

Sick Leave

1560 (A). An officer who is prevented by illness from performing his duties at his place of work and who is not on leave must in every instance report the fact immediately to the Head of his Department, by telephone if possible; and within forty-eight (48) hours he must cause to be delivered to the Head of Department a Medical Certificate of incapacity for work, signed and dated by a Government Medical Officer, or; a Registered Medical Practitioner, certifying if such is the case, an incapacity for work for a period longer than two (2) working days, and stating the probable duration of the incapacity.

...

1563. Sick leave may be granted with full salary up to a maximum period of twenty (20) working days (4 weeks) during a calendar year. All applications for sick leave must be sent to the Permanent Secretary of the Ministry where the officer is employed. The authority to grant sick leave to officers below the rank of Deputy Head of the Department is vested in the Permanent Secretary.

...

1573. After an officer has exhausted the sick leave eligibility of twenty (20) working days and provided there is a reasonable prospect of eventual recovery, supported by Medical Certificates, another period of further sick leave on 7/8's salary may be granted up to a maximum of five (5) months. Officers may elect for the award of any accumulated vacation leave, before applying for extended sick leave on 7/8's pay."

1576. An officer on sick leave shall not be entitled as of right to any salary, personal allowance, or; rental allowance. The grant of sick leave may carry, full pay, half pay, or; any proportion of pay, and the full amount of personal allowances and rental allowance, or; part thereof."

- [24] As may be seen, pursuant to orders 1563, 1573 and 1576 of the General Orders, the Plaintiff was able to apply for a maximum of twenty days sick leave with full salary during a calendar year. And after that period of sick leave was exhausted, she could apply for further sick leave with 7/8's salary up to a maximum of five months, provided she had a reasonable prospect of recovery. Nonetheless, the Plaintiff was not entitled as of right to any salary and sick leave could be granted with full pay, half pay or any proportion of pay.
- [25] Based on the evidence before the Court, the Plaintiff applied for a period of approximately 20 months. However, no evidence whatsoever was led by the Plaintiff regarding the total amount of sick leave authorised by the First Defendant and whether such leave was granted with full pay, half pay or otherwise. Additionally, there is also no evidence from the Plaintiff regarding the amount of leave she actually took with the approval of the First Defendant. As a result, on the Plaintiff's on case, this Court has no way of determining whether the Plaintiff should have been paid her salary during the period June 2011 to September 2012 as she claims.
- [26] This Court is also concerned that the Plaintiff, in her evidence, did not refer to any medical certificates to cover the approximate 20-month period for which leave was requested. In his cross-examination of Ms Clarke, Mr Campbell sought to establish that medical certificates had been produced to the Defendants; however, I am not satisfied that medical certificates were provided to cover all the time that the Plaintiff was absent. Moreover, I found Ms Clarke to be a convincing witness and I accept her evidence that the Plaintiff had a history of absenteeism and that in many cases, her absence from work was not supported by the requisite medical certificates and was unauthorised. The burden lies on the Plaintiff to prove her case on a balance of probabilities and in my view, she has not done so.
- [27] In all the circumstances, I am not satisfied that the Plaintiff was entitled to be paid the sum of \$13,821.76 for the period June 2011 to September 2012 or that the said sum was wrongfully withheld from the Plaintiff by the First Defendant. The Plaintiff's claim that the First Defendant was negligent and acted in breach of contract and/or in breach of their statutory duty when they failed to pay her salary from July 2011 to October 2012 therefore fails.

Was the Plaintiff unfairly and constructively dismissed?

- [28] The Plaintiff claims that the First Defendant failed to follow the discipline and discharge procedures of the Industrial Agreement when they refused to allow the Plaintiff to return to work despite their being no suspension or dismissal of her by them.

- [29] At the outset, I do not accept the Plaintiff's claim that the First Defendant breached the discipline and discharge provisions of an industrial agreement, as no such agreement was produced in evidence at the trial.
- [30] In addition, I do not accept the Plaintiff's claim that she was wrongfully, unfairly or constructively dismissed.
- [31] By a letter dated 29 May 2013, the Permanent Secretary at the Ministry of Education wrote to the Plaintiff in the following terms:

"A review of your file revealed from the commencement of your employment up to present date, you have been absent a total of three hundred and eight-six (386) days since your appointment on temporary month to month terms as Janitress, with effect from 3rd January 2006.

YEAR	AWOL	UNPAID LEAVE	AMOUNT OF DAYS ABSENT PER YEAR
2006	0	15	15
2007	0	22	22
2008	0	21	21
2009	0	87	87
2010	0	55	55
2011	0	90	90
2012	0	26	26
2013	71	0	71
Total amounts of days absent			387

Your attention is drawn to General Orders 924 and 926 and Public Service Commission Regulations 49, which state the following:

General Order 924

The normal hours of work of both indoor and outdoor staff are 40 hours in each week including one hour luncheon break each day Monday to Friday. The actual hours of arrival and departure may be varied to meet departmental requirements, and furthermore, staff may be required to attend on such days and for such hours as are considered necessary for the efficient conduct of public business.

General Order 926

"Regular and punctual attendance is required of every officer. Working less than the minimum hours laid down, irregular attendance and unauthorized absences from the place of work will form the basis of disciplinary charges."

PSC Regulation 49

Where any public officer is absent from duty without leave or reasonable cause for a period exceeding seven days and the officer cannot be found within a period of fourteen days of commencement of such absence or, if found, no reply to a charge of absence without leave is received from him within ten days after the despatch of the charge to him..."

You are asked to show cause in writing within fourteen (14) days of receipt of this letter and in accordance with the provisions of the Public Service Regulation 41 why your services should not be terminated. Failure to do so within the time specified, I am to advise that this Ministry will begin the process that may result in your termination from the Public Service on the grounds of unsatisfactory attendance pursuant to General Orders 924 and 926 and PSC Regulation 49.

In acknowledgement of receipt of this letter, kindly sign and date the enclosed copy of this letter and return it to the undersigned.”

And the Plaintiff responded by a handwritten letter dated 30 May 2013 as follows:

“I Mrs Nikita Bostwick-Miller am writing on behalf of my reason for not being to work because of medical and personal reason [sic] beyond my control [sic] Because of my medical state I was unable to Bring in my medical at that time But I did Bring Them in [sic] I was sent to another doctor [sic] There for [sic] at This time I really need The time off [sic] It is not That I don’t want to come to work But right now it be on [sic] my control I hope that you will understand This matter [sic] I really need the Absence at this time am requesting the leave To deal with my medical state [sic] I wish to return to work on the 22 July 2103 [sic] Thanking you in advance for your consideration in This matter”

[32] The Plaintiff’s response is stamped as having been received by the Department of Education on 12 June 2013 and there is no explanation for that delay. In any event, her response was reviewed by the First Defendant, who responded on 9 August 2013 to inform the Plaintiff that her response was unsatisfactory and a recommendation for her dismissal would be made to the Public Service Commission accordingly.

[33] It is the view of this Court that there were no deficiencies in that process. Furthermore, there is no proper basis for a claim of dismissal, unfair, constructive, or otherwise, as there is no evidence before this Court that the Plaintiff’s contract of employment was brought to an end. Indeed, the evidence is that, while the First Defendant had embarked on a procedure that could ultimately lead to the Plaintiff’s dismissal, at the time of the commencement of this action, she remained an employee. This was made clear by Ms Clarke in her evidence while under cross-examination by Mr Campbell. Her evidence in this regard is as follows:

“Q. So we can agree then, that the Plaintiff is still employed by the First Defendant?

A. She is still employed, on unauthorized leave, that is why her matter was forwarded to the Ministry of Public Service for Public Service to process her termination.”

- [34] Furthermore, Ms Clarke’s evidence is consistent with the Plaintiff’s pleaded case, as the Plaintiff pleads in her Statement of Claim (under the heading “Particulars of Breach of Contract”) that she “was contracted to work as a Janitress by the 1st Defendant from 3rd January, 2006 and is currently still employed with the 1st Defendant.”
- [35] The Plaintiff’s claim that she was unfairly or constructively dismissed fails accordingly.
- [36] In light of my findings above, the Plaintiff’s claim as set forth in her Writ is dismissed and judgment is granted in favour of the Defendants, who shall have their reasonable costs, taxed if not agreed.

DATED this day of February, 2022


TARA COOPER BURNSIDE
JUSTICE (AG)