SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT STIRLING

[2019] SC STI 88

STI-A62-18

JUDGMENT OF SHERIFF SG COLLINS QC

in the cause

JOHN GARDINER

Pursuer

against

RENYANA STAHL ANSALT

Defender

Pursuer: Barr; Jardine Donaldson, Solicitors
Defender: Garrity; Beltrami & Co, Solicitors

Stirling, 1 August 2019

The Sheriff, having resumed consideration of the cause, (i) refuses the defender's motion to sustain its first and second pleas in law; (ii) appoints the cause to a proof before answer, all pleas standing, at a date to be afterwards fixed, parties to liaise with the sheriff clerk thereon; (iii) finds the pursuer entitled to the expenses of the debate on 12 July 2019, allows an account thereof to be given in and remits same, when lodged, to the auditor of court to tax and report; and (iv) certifies the debate as suitable for the employment of junior counsel.

NOTE

Introduction

[1] With effect from 1 January 2014 the parties entered into a written contract by which the defender, a Lichtenstein incorporated company, employed the pursuer as a manager on

the Drumlean Estate in the Trossachs. The contract was for a fixed term of five years, with a gross monthly salary of £3,000. This salary was paid up to and including November 2015. The defender then terminated the contract. It avers that it was entitled to do so because of breaches of contract by the pursuer, in particular, gross misconduct and breach of fiduciary duty. The pursuer denies this, and avers that the termination was wrongful. He seeks damages of £85,000, calculated on the basis of the monthly salary which would otherwise have been due from December 2015 to the end of the fixed term of the contract in December 2018, plus a sum for inconvenience, but less his earnings from other employment and social security benefits during that period. The defender tabled pleas in law to the relevancy and specification of this claim and I heard debate on these pleas.

Submissions

[2] Mr Garrity, Advocate, for the defender, moved me to sustain his first plea in law and to dismiss the action, which failing to sustain his second plea in law and exclude certain averments from probation. His primary submission was that the pursuer had failed to aver a relevant claim for damages. Even if the contract had been wrongfully terminated by the defender, which was denied, it was clear on the authorities that the measure of damages was limited. *Prima facie* it was a sum equivalent to the wages which would have been earned between the time of actual termination and the time when the contract might have been lawfully terminated by due notice: Middlemiss & Downie, *Employment Law in Scotland*, paragraph 7.12; Harvey, *Industrial Relations and Employment Law*, Issue 269, paragraph 393. The pursuer's entitlement was limited to being put in the position that he would have been had the defender exercised his rights under the contract in the way that would have been least burdensome to it: *Laverack* v *Woods of Colchester* [1967] 1 QB 278 per Diplock LJ at 294;

Morran v *Glasgow Council of Tenants' Associations* 1997 SC 279 per the Lord President (Rodger) at 283.

[3] In the present case, submitted Mr Garrity, there was no dispute that the contract had been terminated from 1 November 2015. The pursuer was entitled to three months' notice in terms of clause 4 of the contract. Even if the dismissal was wrongful, on the above authorities it had to be assumed for the purpose of assessment of damages that the defender would have given such notice, this being the contractual course least burdensome to it. It was accepted by the pursuer that he had been paid for November 2015. So the maximum claim for damages open to him equated to two months' salary, or £6,000, less tax. Indeed it would be less than this, given that the pursuer himself averred that he had received Employment and Support Allowance in the sum of £741.45 for the period 1 December 2015 to 15 February 2015. In any event the averments of loss and damage relative to any dates after the end of the period of notice were irrelevant. The claim for damages was misconceived and the action should be dismissed.

[4] Alternatively, and turning to the defender's second plea in law, Mr Garrity moved me to exclude articles 2 and 3 of condescendence from probation in their entirety and to exclude article 6 with the exception of the first two sentences. He pointed out that articles 2 and 3 related to the parties' relationship between 2004 and 2014 during which time, in summary, the pursuer worked on the estate in return for certain housing costs and permission to operate other income generating business ventures, including dealing in weapons and ammunition, retailing outdoor clothing, operating a burger van and sale of certain game and livestock. There were disputes as to the nature and extent of these permissions, but it was submitted that the averments were wholly irrelevant to the claim for damages, which was and could only be founded on an allegation of a breach of the written

contract of employment entered into by the parties with effect from 1 January 2014. Article 6 set out the pursuer's averments of loss. From the third sentence on these averments all related to the period after 1 February 2015, on which date the three month period of notice would have expired had the contract been terminated in terms of clause 4 of the contract. Even if the court did not dismiss the action, for example because it was satisfied that there was a case for proof in relation to loss during the notice period, all the averments of loss for any subsequent period were irrelevant and should be deleted.

[5] In reply for the pursuer Mr Barr said that the action had originally been raised by a previous agent as a payment action, but that it was now accepted that the only proper claim was for damages for wrongful dismissal. He did not dispute the general proposition that if a contract of employment contains a clause entitling the employer to terminate without notice, and without cause, then the employee's claim for damages for wrongful dismissal will normally be limited to the wages which he would have been due for the notice period. An example of such a notice clause could be seen in *Morran* at page 281. However there was no general or implied right of an employer to terminate on notice without cause, and section 86 of the Employment Rights Act 1996 did not provide one. Mr Barr also did not dispute the proposition that the assumption to be made in assessing damages was that the employer would have taken the least burdensome course available to him, but only where such a course was open consistent with fulfilment of the employer's obligations under the contract. So if the contract was only terminable with notice if certain events occurred, the court could not assume without inquiry that such events had in fact occurred.

[6] Against this background Mr Barr submitted that clause 4 of the contract of employment in the present case was a red herring. It did not give the defender a general or unqualified entitlement to terminate the contract by giving notice. Properly understood,

the effect of clause 4 was that it was only possible to terminate the contract on giving three months' notice if "special reasons" existed. If there was ambiguity in the terms of the clause, it fell to be interpreted *contra proferentum*, that is, construed against the defender as the party citing and seeking to rely on it to exclude any obligation to pay damages for the period after February 2015: cf McBryde, *Contract*, paragraphs 8.38 – 8.40. If the defender was not entitled, consistent with fulfilment of its contractual obligations, to terminate on three months' notice unless special reasons existed, then proof was necessary in order to determine this. If special reasons were not established, then the pursuer's claim would not be limited to the three month notice period. The defender's first plea in law should be repelled.

[7] As to the defender's second plea in law, Mr Barr accepted that articles 2 and 3 of condescendence related to the period prior to 2014. However he pointed out that clause 2 of the contract set out the pursuer's duties as employee. These included "carrying out all tasks he is familiar with over the past years to include… hunting support" and "general duties as carried out over the past years". Accordingly the pursuer's duties under the employment contract could only be properly understood by reference to his activities on the estate prior to 2014. They provided relevant background to the issues now in dispute, in particular the defender's claim that the pursuer had breached the duty of loyalty, fidelity and confidence by making secret profits, by shooting and selling livestock other than with permission. As to article 6 of condescendence, the pursuer' averments as regards assessment of damages post February 2015 should not be excluded, but should remain until and unless it was established after proof that special reasons existed entitling the defender to terminate the contract on three months' notice from 1 November 2015.

The law

[8] Where an employment contract gives the employer an unconditional right to terminate the contract on giving notice (as will typically be the case), the measure of damages for wrongful dismissal will normally be limited to the wages and other emoluments which the employee would have received had the stipulated period of notice been given, this being the least burdensome way that the contract could have been performed from the employer's perspective: *Laverack*; *Morran*. The assumption is that the employer would have chosen to terminate the contract lawfully by giving notice at the very moment that he had sought to bring it to an end unlawfully in breach of contract: see *Janciuk* v *Winerite* 1997 WL 1104024 EAT per Morison J. So for example in a straightforward case where the contract provides that the employer may terminate it on giving three months' notice, damages for wrongful dismissal in breach of the contract will not exceed the wages which the employee would have received during the period of notice which he could have been given consistent with the terms of the contract. The underlying principle is that as the employer could in theory have terminated the employment by giving three months' notice without breaching the contract, he cannot be liable for damages in excess of those which could have been awarded for termination by giving such notice, even if in fact he did breach the contract by summary dismissal.

[9] Where a contract is for a fixed period and there is no provision made for termination by notice before that period expires, damages will be calculated having regard to what the employee would have earned had the contract been fulfilled, subject to the obligation on him to mitigate his loss: see Stair Memorial Encyclopaedia, *Employment Law* (2nd Reissue) paragraphs 140, 144, 145. In particular the employee would be expected to seek to obtain alternative employment. But the fact that the contract may include other means by which it

can be terminated early for cause cannot provide a limitation on the measure of damages unless such cause is shown to exist. As the Lord President said in *Morran* (at page 284) "In order to determine what loss or damage arises from the breach of contract itself… the court must first look to what the pursuer's position would be if there were no breach of contract." Therefore in order to limit assessment of damages by reference to an alternative means of terminating the contract that alternative must be lawful. Damages are not limited because the employer could in theory have dismissed the employee in a different way which would also have been unlawful. So for example if a contract has no unqualified notice clause, but entitles the employer to dismiss the employee if he becomes unfit to perform his duties, damages in a claim for wrongful dismissal are not limited by assuming that the employer could have dismissed the employee on grounds of unfitness – at least unless and until it is established that the employee was indeed unfit, and thus that the employer was entitled to terminate the contract on this ground without breaching it.

[10] A third situation arises where the contract provides for a disciplinary procedure or other administrative process which must be followed after notice of dismissal has been given. In such a case the time which such a process would have taken may be added to a notice period when assessing the period in respect of which damages are to be assessed: see Harvey, paragraph 393.01. This, the so called "*Gunton* extension" (per *Gunton* v *Richmond on Thames Borough Council* [1981] 1Ch 448) might, at first glance, seem to run counter to the point made above. If the purpose of the disciplinary procedure is to find out whether there were good grounds to dismiss the employee, to limit the period for which damages may be awarded by reference to the time which would have been taken to complete the disciplinary procedure might appear to require the court to assume that the employee would have been found guilty under that procedure, even though it never in fact took place. But this would

involve a misreading of *Gunton*. In terms of the contract in that case the employer was entitled to dismiss *either* for no reason on a month's notice, *or* for a disciplinary reason. It did the latter, but denied the employee the disciplinary procedure to which he was in such circumstances entitled. So by including the period which should have been taken up by completing the disciplinary procedure, the court was not assessing the chance that the procedure might have exonerated the employee. Rather, it was assessing the period of time for which the employee would have continued to be employed before the employer could have lawfully terminated the contract on a month's notice without reason, that is, whether or not the employee had been exonerated by the disciplinary procedure: see *Gunton* at 470B - F, per Buckley LJ; *Janciuk*.

[11] Section 86 of the Employment Rights Act 1996 sets out certain statutory rights of employer and employee to minimum periods of notice of termination. In the case of notice to an employee, the minimum period varies between a week and twelve weeks, dependent on length of service. But if a contract does not include a clause entitling the employer to terminate on notice without reason, section 86 does not operate to imply one. Rather, if the contract does include such a clause, and it bears to give a lesser period of notice than the statute, the court will treat the employee as entitled to the longer statutory period. Subsection (6) provides that section 86 does not affect the right of either party to treat the contract as terminable without notice by reason of the conduct of the other party. The statute therefore does not preclude immediate dismissal for gross misconduct, and contracts will typically make express provision for this. But in a claim for wrongful dismissal where the employer avers gross misconduct the court cannot assume that such averments are well founded in the absence of proof. Were it to do so then the measure of damages in wrongful dismissal claims would always be nil, because there would in effect be an assumption that

no notice need be given. That cannot be right. It underlines the point that if the right to dismiss on notice is conditional upon the employee's conduct, then that conduct must be established in fact before the assessment of damage in a wrongful dismissal claim is limited to the period of notice stipulated.

Decision

[12] There is no dispute that between 1 January 2014 and 1 November 2015 the pursuer was employed by the defender in terms of the written contract now lodged as production 5/1/1. In this document the parties are accurately designed, the contract is clearly stated to be for a fixed term of five years from 1 January 2014 to 31 December 2018, and the pursuer's gross monthly salary is specified as £3,000. Other matters are less clear. In particular clause 4 of the contract is in the following terms:

> "Termination
> It may be possible to terminate the contract early for special reasons, giving notice of three months. For example in the event of:
> - A lasting inability to work
> - A dispute that cannot be settled, not even by bringing in neutral persons
> - Gross misconduct will obviously carry no notice period…"

This is a poor piece of drafting. But the defender seeks to rely on this clause in order to exclude or at least restrict its liability for damage in this action, and accordingly insofar as there is ambiguity it falls to be construed against the defender's interest: cf. *Geys* v *Societe Generale* [2013] 1 AC 524 per Lord Hope of Craighead at paragraphs 34 – 40). But while it is apparent that there are some ambiguities in the clause, for present purposes it is sufficiently clear that it is not a straightforward notice clause. It does not give the defender an unconditional right to terminate the contract on giving three months' notice, that is, without cause. On the contrary, it provides that if, and only if, there are "special reasons" (of which

non exhaustive examples are given) the defender may be entitled to terminate the contract by giving three months' notice. This reading was accepted on the defender's behalf, but Mr Garrity's submission was, in effect, that as a matter of law assessment of damages in the present case was still limited to a three month period following termination.

[13] This submission must be rejected. As explained above, a limitation on assessment of damages for wrongful dismissal arises by reference to the period within which the contract could have been lawfully terminated by the employer by giving notice. If termination is conditional not merely on the expiry of a notice period, but also the occurrence of a particular event, then it cannot be determined whether the contract could have been lawfully terminated unless it is first established whether that event has occurred. Thus if termination after a period of notice is also conditional on the employee having a "lasting inability to work", it is necessary to establish whether he had such an inability before deciding whether the employer could have lawfully terminated the contract by giving the requisite notice. If after inquiry it were to be found that the employee did not have such an inability, then any termination on this ground would have been unlawful, whether notice had been given or not, and assessment of damages would therefore not be limited to the notice period.

[14] In the present case the giving of three months' notice is conditional on "special reasons", of which a "lasting inability to work" is one specific example. There are questions as to what other matters might constitute "special reasons", and as to whether their existence should be judged objectively or viewed from the employer's perspective. And the defender does indeed aver that the pursuer had a "lasting inability to work" entitling him to terminate the contract with notice. But for present purposes it is sufficient to recognise that whether "special reasons" exist or not is, at least in part, a question of fact. That being so,

and given the state of the law set out above, the court is not entitled to assume at this stage, as a matter of relevancy, that the defender was entitled to lawfully terminate the contact merely by giving three months' notice pursuant to clause 4. It is therefore not appropriate, without first hearing evidence, to determine that any damages which might be awarded for wrongful dismissal are confined to that period. If no special reasons are found to exist, then the defender could not have lawfully terminated the contract pursuant to clause 4. There being no other contractual provision for termination, the pursuer would then be at least entitled to inquiry into claimed losses arising after 1 February 2015 – albeit that they would be restricted if it were determined that he had failed to mitigate his loss. In these circumstances the defender's first plea in law cannot be sustained at this stage.

[15] As to the defender's second plea in law, there is no dispute that the defender terminated the contract without notice. The principal controversial issue is therefore whether it was entitled to do so. This rests in particular on proof of its averments, set out in answers 4 and 5, that the pursuer was in breach of contract. The specific allegations are that (i) the pursuer made "secret profits" by shooting, selling and dealing in wild boar and red deer without permission, his only entitlement in this regard being to sell the game and livestock shot by the defender's principal and his friends during annual shooting parties; and (ii) that the pursuer failed to perform "any of his contractual duties" on the estate during 2015, but specifically in that (a) estate houses were dirty and unkempt, (b) gutters on the estate buildings were choked with leaves and mud, (c) garbage and waste was lying around, (d) the workshop was in disarray, (e) heating oil was absent from almost every heater, (f) grassland had not been cut or fertilised, (g) rushes had not been cut, (h) ditches required to be cleared, (i) fences were in poor condition, (j) vehicles had not been serviced or maintained, and (k) roads and tracks were in poor condition. But in order to establish

whether by doing or failing to do some or all of these things the pursuer was in breach of the contract, it is first necessary to understand his rights and duties under it.

[16] In that regard clause 2 of the contract provides as follows:

> "2. Duties
> - [the pursuer] shall continue carrying out all tasks he is familiar with over the past years to include:
> - Monitoring and ensuring the security of Drumlean Estate buildings to include "Pass House"
> - Hunting Support
> - Looking after all technical facilities including the vehicles
> - General duties as carried out over the past years…"

Again, the drafting is poor. But what is sufficiently clear is that it is not possible to properly understand the nature and extent of the duties imposed on the pursuer under the 2014 contract without establishing what were '"all the tasks he was familiar with" and his "general duties" on the estate prior to 2014. It is not disputed that he started working there around 2004 and there is no suggestion that he was under a written contract at that time. The pursuer avers that initially the nature and extent of his role was not known precisely. So in order to determine whether he failed to perform any of his duties under the contract after 2014 it is necessary to establish the nature and extent of his tasks and duties on the estate which he in fact performed between 2004 and 2014. For this reason the averments in articles 2 and 3 regarding the period prior to January 2014 are directly relevant if and insofar as they go to establishing this.

[17] In article 2 the pursuer makes certain averments regarding the issue of shooting and selling livestock in the period after 2004. In particular he avers that he "received modest payments from the sale of carcasses of livestock shot on the estate". In answer the defender avers that the pursuer was engaged in 2004 "as a self employed estate manager and stalking/hunting assistant in connection with the estate". It is said that his "primary

responsibility" was to assist with the defender's annual shooting parties, and that he was permitted to sell the game thus shot but was not otherwise entitled to engage in culling or selling the game or livestock. That averment is met by a general denial by the pursuer. The extent to which the pursuer was or was not entitled to shoot and sell game and livestock on the estate after 2014 is put directly in issue by the defender by his claim that the pursuer breached his contract by making secret profits in this regard. But because of the terms of clause 2 this can only properly be determined by considering the pursuer's tasks and duties in this regard between 2004 and 2014, and which are the subject of the disputed averments just referred to. These averments are therefore relevant and should go to proof.

[18] In relation to the issue of the pursuer's duties in relation to estate management, he avers in article 2 that after 2004 he "would be at the estate daily, carrying out tasks such as looking after cows, deer and wild boar, fixing fences, looking after the buildings, grass cutting and ditching." This averment is met by a general denial. That is surprising, given that the defender, as already mentioned, later avers that the pursuer was in breach of contract in 2015 for failing to perform most of these very tasks. If the pursuer was not contractually bound to perform them, it is hard to see how he could be in breach of contract for failing to do so. And given the terms of clause 2, it is hard to see how the defender would have been contractually bound to perform these tasks after 2014, if they were not tasks which he carried out prior to this. As just noted, the defender avers that the pursuer was engaged as a "self-employed estate manager", but it is not specified what particular duties and tasks this involved. It is also averred by the defender that the pursuer was permitted "to operate certain additional business ventures from the estate" (namely dealing in weapons and ammunition, outdoor clothing retailing, and operating a burger van). But in any event, the nature and extent of the pursuer's estate management duties after 2014 and

whether or not he fulfilled them, are put directly in issue by the defender. Given the terms of clause 2 of the contract, it is necessary in order to determine this matter to first ascertain the pursuer's estate management duties and tasks between 2004 and 2014. These are the subject of above mentioned disputed averments in condescendence and answer 2. They are therefore relevant and should go to proof.

[19] Beyond the averments just mentioned, article 2 contains general averments as to how the pursuer came to work on the estate in 2004, that he was given the use of accommodation, that certain housing costs were met, and that he expected to receive additional remuneration by way of a salary, consideration of which was deferred. This last matter is also the subject of the averments in article 3. There is dispute about some of these matters and strictly speaking they are not directly relevant to establishing the nature and extent of the pursuer's duties on the estate prior to 2014. However they provide background to and therefore may assist in understanding the rather unusual working relationship between the parties between 2004 and 2014, which so may be of some relevance. Furthermore, to hear evidence in relation to these averments is unlikely to prolong the proof to any significant extent. Although they may be of peripheral relevance it is therefore not appropriate to delete these further averments at this stage.

[20] Insofar as the defender's second plea in law is directed to the averments regarding assessment of loss in Article 6 of condescendence, it is very much bound up with the issues to which the first plea in law relates. If the defender can establish that it was entitled to terminate the contract by giving three months' notice, then the pursuer's averments of loss in Article 6 will be irrelevant insofar as they relate to losses said to arise after this period. If the defender establishes that it was entitled to terminate the contract without notice, then the

whole of Article 6 will be irrelevant – indeed there will be no good claim for damages at all. However for the reasons already stated these matters can only be determined after proof.

Conclusion

[21] Neither the first nor second pleas in law for the defender can be sustained at this stage. However both these pleas should be left standing until after proof, which should therefore be a proof before answer.

[22] The pursuer has been successful in this debate and so is entitled to his expenses. For what it is worth I will certify the debate as suitable for the employment of junior counsel, as I was asked to do.