IN THE SUPREME COURT OF BELIZE, A.D. 2005

CLAIM NO. 175 OF 2005

	(ROMEL PALACIO	**CLAIMANT**
	(	
BETWEEN	**(AND**	
	(	
	(BELIZE CITY COUNCIL	**DEFENDANT**

Mr. Dean Lindo, SC, for the Claimant
Mr. Edwin Flowers, SC, for the Defendant

AWICH J.

28.4.2006 **JUDGMENT**

1. *Notes: Termination of employment; according to contract of employment, and the Common Law generally; whether there was wrongful dismissal or wrongful summary dismissal. Notice of termination.*
The Labour Act, Cap. 297.

2. Mr. Romel Palacio, the claimant, has come to this Court claiming wrongful dismissal, and somewhat vaguely wrongful summary dismissal, by the employer, Belize City Council, the defendant, from his post of prosecutor in the Municipal Court Department. Mr. Palacio has asked for $188, 306.78 as redress. That, he stated, was the total sum made up of salary, gratuity, and interest on judgment sum.

The Facts:

3. Mr. Palacio was appointed by a letter dated 6.2.2001, to the post of prosecutor with effect from 7.2.2001. He was confirmed in the post by a letter dated 22.5.2001. The period of employment was not

specified, so it was for “an indefinite period”, and all being well, the employment would last until retirement, with pension or gratuity, under SS: 31 to 45 of the Belize City Council Act, Cap. 85, Laws of Belize; and subject to termination by notice under the Labour Act, Cap. 297, or reasonable notice, by either side, since longer notice was not provided for in the terms of the contract of employment. The claimant’s job descriptions were spelt out in the letter of appointment as to:

> “carry out duties of prosecuting matter pertaining to Chapter (192), Chapter (66) and Chapter (32) on behalf of the Belize City Council;
>
> ensure that all court papers are prepared in a timely and accurate manner;
>
> assist the coordinator of the Municipal Court on proceedings when advised to do so;
>
> report to work immediately after the City has suffered a disaster; and
>
> any other reasonable assigned duties”.

4. On the 26.4.2004, Ms. P Bodden, the “Court Manager”, in the Municipal Court Department and the immediate supervisor of the claimant, wrote to the City Administrator, reporting her observation of what she described as, “the attitude and behavior” of the claimant. The City Administrator is the final administrative official of the City. The details of what Ms. Bodden considered were misconducts befitting the description, “attitude and behavior”, were these:

4.1 withdrawing a traffic case against a Mr. Mangar contrary to the decision of the supervisor settling the case out of court on condition that Mr. Mangar pays $75.00.

4.2 “entertaining defendants in his office and coaching and educating them to defend themselves in courtroom”, example was given of the case against Mr. Mangar;

4.3 begging court for lenient punishment of defendants, example was given of the case against a Mr. Pickwood;

4.4 that he was “pigheaded and stubborn”, did not follow rules and regulations and ignored verbal and written directives, example was given of ignoring a memo directing that only two persons, not including the claimant, were authorized to settle cases out of court;

4.5 refusing to make amendments to charges as suggested by magistrates, leading to dismissal of cases;

4.6 pursuing in court, the case against a Mr. Nicholas after his defence that he did not own the subject vehicle at the time, had been accepted by the supervisor; and

4.7 that generally, the supervisor “cannot depend on him [Mr. Palacio] to carry out the role of a prosecutor for the Council”.

On these complaints, the supervisor recommended that: “Mr. Palacio’s credibility be reviewed by the new Disciplinary Committee”.

5. The City administrator pursued the report made by the supervisor, by writing on the 29.4.2004, to the claimant, putting to him the above complaints and directing the claimant: “to show cause within seven days, why your services should not be terminated in the interest of protecting the Council”.

6. The claimant responded in great details in a long letter dated 5.5.2004, to the City Administrator. I list below the more relevant details of the response:

6.1 The claimant’s employment “should not be terminated”, because he ‘had not been a threat or liability”, he had been an “asset” to the Council, he had not done anything to make the Council vicariously liable, he intended to dedicate his services and loyalty to the policies of the Council.

6.2 He had never been absent or left his place of work except when ill.

6.3 The serious allegations had been made and his file had been reviewed by his immediate supervisor without properly notifying the claimant or giving him verbal or written warning or reprimand.

6.4 He had never been tried and found guilty by any tribunal, of the matters in the report.

6.5 He had never stolen anything or obtained any monetary advantage out of his work.

6.6 He had paralegal qualification and had the skill required for the work.

6.7 The allegations about not taking views of magistrates to have charges amended came from a magistrate who was unhappy with a traffic officer who had issued a traffic ticket against the magistrate. The magistrate raised the matter improperly in court when the officer was a witness in another case, and the officer responded rudely, the magistrate reported her to the supervisor and the claimant did not support the magistrate's story.

6.8 Another magistrate also made a false allegation that the claimant was not qualified because the claimant had successfully prosecuted a friend of the magistrate's in the magistrate's court.

6.9 A prosecutor's duty was to act as a "Minister of Justice", he had to give an accused person any evidence favourable to him; that was what the claimant did.

6.10 As a prosecutor, he was entitled to decide whether he would ask for an amendment of a charge, it was not a matter for the magistrate or the court manager.

6.11 As a prosecutor in court, it was for him, not the supervisor, to decide whether he would withdraw a case.

6.12 He was entitled to settle cases out of court, if Ms. Bodden or Mr. Ramclam, (the two authorized to) were away because the business of the Council had to proceed.

6.13 When Mr. Mangar pleaded not guilty, and based on the fact that he was charged in April 2004, with an offence wrongly stated to have been committed on a future date in July 2004, the claimant had no choice, but to withdraw the case. (The date was written as 07/04/04 instead of 04/07/04). The magistrate reported that matter out of "mischief".

6.14 In the case against Mr. Nicholas, he the claimant, after having requested two adjournments, proceeded to prosecute the case in the absence of Mr. Nicholas when he failed to attend court with the letter to show that he did not own the vehicle; he only brought the letter after the conviction. The claimant then reported to the supervisor.

6.15 In the case of Ms. Tillett, raised by the claimant apparently to refute the report that the claimant entertained and coached defendants, the claimant explained that although the magistrate had on the 17.4.2004, ordered arrest of Ms. Tillett and adjourned the case to 20.5.2004, Ms. Tillett reported to the magistrate at lunch time the same day and was told to return at 3:30 p.m. She returned, but the magistrate was in a meeting with the supervisor of the claimant. The claimant then allowed her to pay $25.00 for the offence and told her to go and return on the adjourned date. He told her to go, he explained, because the warrant of arrest had not been prepared and signed by the magistrate; it would be unlawful to keep Ms. Tillett.

6.16 There had been a false allegation against the claimant before, which the attorney for the Council, in a letter dated 2.7.2002, had discontinued.

7. These explanations by the claimant were considered unsatisfactory. On 7.5.2004, the City Administrator wrote to the claimant that the Disciplinary Committee had met and recommended that the claimant's services "be no longer required". The letter went on to state: "Pursuant to Section 13 (3) of the Belize City Council Act, the council hereby informs you that your services as prosecutor are terminated effective immediately".

8. The claimant then made some efforts to have the decision reconsidered. One such effort was to take the matter to the Ombudsman, who took it up with the City Council and recommended that the claimant be re-employed.

9. The Disciplinary Committee met and reconsidered the matter. On 13.5.2004, the City Administrator again wrote to the claimant notifying him that the Disciplinary Committee had a second meeting at which the claimant was granted opportunity to be heard, and that the Committee unanimously agreed to maintain its earlier decision to advise the Council that the claimant's "services be terminated".

10. On the above facts, the claimant stated his grounds of claim in law, at paragraph 2 of his statement of claim in the words*: "he was wrongfully dismissed"*, and at paragraph 3, in the words: "*the defendant on the 7th of May 2004, terminated the services of the claimant summarily"*. The claimant further pleaded that he had been *"ready and willing to serve"* the City Council.

Determination:

11. The letter of employment to the claimant, did not set out terms and conditions of employment, and disciplinary actions and procedures that would apply. The Council does not have general regulations that regulate, terms and conditions of employment and disciplinary actions and procedures. In that void, the Court will apply the general provisions of ***the Belize City Council Act***, and ***the Labour Act,*** where they apply. If any point would still remain outside the provisions of those Acts, the Court would then apply the principles of *"the Common Law, and all Acts in abrogation or derogation or declaratory of the Common Law"*, as at 1.1.1899 – ***see S: 2 of the Imperial Laws (Extension) Act, Cap. 2, Laws of Belize***. The case **of Belize City Council v Gordon 3 Bz L.R. 363,** did not present such a difficulty because Mr. Gordon was employed on a detailed contract. Belize does not have Employment Act or Industrial Relations Act which some countries have, so some of the modern rules about "unfair dismissal" are not yet available in Belize. And neither party has relied on any international convention adopted by Belize.

Summary Dismissal:

12. Wrongful summary dismissal as the basis of the claim cannot succeed. The dismissal of the claimant was not a summary dismissal. In law, wrongful summary dismissal is the immediate termination of employment upon a single minor act of misconduct or negligence. Summary dismissal is a very strong measure that can only be justified in exceptional circumstances such as, upon breach of a fundamental term of the contract of employment, or when the employee is guilty of gross misconduct which is inconsistent with the fulfillment of conditions of his employment, or guilty of gross negligence. For example, it was justified in a case from Barbados, ***Gulstone v Anchor***

Life Insurance Co. Ltd. [1976] 27 W.I.R 68, wherein a claims manager of an insurance company, upon a claim having been submitted on the death of an insured whose policy had lapsed, and the manager fully knowing, sought to revive the policy. An earlier Privy Council appeal case was applied as authority, it was ***Jupiter General Insurance Co. Ltd. v Ardeshir Bomanji Shroff [1933] All E.R 67***. It was also an insurance case. In the case, the manager of life insurance department of an insurance company in India, recommended the issuing of policy upon a life which he knew the managing governor had, a few days before, refused to underwrite, that is, reinsure from another insurance company. The decision of the High Court of India (Appellate Division) that the respondent was unlawfully and summarily dismissed on a single act of misconduct was quashed and that of the trial judge was restored. The Privy Council regarded the misconduct of the respondent as so serious as to "make his immediate dismissal justifiable". However, their Lordships decided that upon the true construction of the respondent's contract, he was entitled to more than one month's notice on dismissal.

13. The claimant in this case was dismissed for an accumulation of at least seven allegations of misconduct referred to as "attitude and behaviour". It is true that the letter of 7.5.2004, stated that the claimant's services were "*terminated effective immediately*". But termination without notice is one factor, that termination was based on only one misconduct is another, in determining whether a dismissal has been a summary one. Summary dismissal is decided by answering the question as to whether the particular single and isolated act of the employee is sufficiently fundamental or so grave as to warrant immediate dismissal, without the need for giving warning. Put another way; is the employee not entitled to a second chance, or notice to prepare prior to termination date, considering the nature of his wrongful act?

14. The Disciplinary Committee accepted the seven incidents of misconduct as true. The incidents were said to have occurred over time, and there has been evidence that the supervisor had raised some of them with the claimant and warned him about them. Assuming the incidents were true, the dismissal of the claimant has not been a summary one; it was based on a series of acts of misconduct punctuated with warnings. The question as to whether the Committee was wrong in believing the allegations in the report belongs in the determination as to whether the claimant was otherwise unlawfully dismissed.

15. The above view aside, it was submitted by counsel for the Council that the employment of the claimant was "terminated, he was not dismissed", he was paid in lieu of notice and paid severance pay. The claimant did not contest the payments, but maintained that he was dismissed. The payment compensating for notice would have cured summary dismissal, had there been such a dismissal.

Unlawful Dismissal:

16. The claimant did not set out the particulars that he relied on for the claim that his dismissal was unlawful, as opposed to summary, nor did the defendant request the particulars. The claimant's case was conducted simply on the basis that the allegations upon which he was dismissed were false. The defendant responded by efforts to prove that those were facts and warranted dismissal. I shall, nevertheless, consider the evidence with a view to determining whether some of the usual instances of unlawful dismissal occurred.

17. Procedurally, the dismissal was not unlawful. The claimant did not plead any procedural unfairness, but his letter mentioned that the

allegations against him had been made, and his file had been reviewed, by his supervisor without properly notifying the claimant. Factually, the evidence showed the contrary. The claimant was afforded opportunity at the appropriate time, that is, before the complaints were put to the Disciplinary Committee, so that his answers were also put to the Committee. The letter of 29.4.2004, by the City Administrator, conveying the allegations to the claimant and inviting him "to show cause", was the opportunity. It was not necessary that the Committee adopt a similar elaborate procedure used in courts of law – ***see Board of Education v Rice [1911] A.C 179,*** and compare ***Re Flowers 3 Bz L.R. 305***. The claimant indeed utilized the opportunity, he wrote the long letter dated, 5.5.2004. He was even given a second opportunity after the Ombudsman had requested the Council to reconsider the claimant's case. The claimant in person, attended the meeting of the Committee.

18. There was mention in Court that the supervisor was present at the second meeting. There was, however, no mention of what role she played. It appeared from the evidence that she was there to present the complaints, if called upon. She did not participate in the decision. That may well be the reason the claimant never pleaded procedural unfairness and never testified about it. In future, the Council must ensure that a senior officer who has brought a complaint against an employee, does not attend and sit as one of the committee members, and that if he is invited purely to present a complaint against the employee, the role of the officer is clearly explained to the employee, and the officer leaves the room immediately after presenting the complaint, otherwise the proceeding of the Committee will be marred by the rule against bias, part of the rules of procedural fairness – compare the case of ***Lawal v Northern Spirit Limited [2003] U.K.H.L 35.*** In the case, the House of Lords held that a system by which recorders (practising advocates) were appointed and sat as part-time

judges in the Employment Appeal Tribunal were also allowed to appear as advocates for clients before the Employment Appeal Tribunal when the advocates did not sit as judges, was bad because, “a fair-minded and informed observer, having considered the given facts, would conclude that there was a real possibility that the tribunal was bias”.

19. Contractually, the claimant had the obligation to carry out the duties set out in his job descriptions. He had to carry them out in the manner stated, and in accordance with the usual duties implied in Common Law, since the letter of employment did not cover much of the terms and conditions of service. His implied duties included the duties:

1. to be ready and willing to work;
2. not to willfully disrupt the employer’s undertaking’
3. to work only for the employer during the hours of work;
4. to offer service personally;
5. to take reasonable care in his work – the duty against negligence;
6. to obey lawful and reasonable orders of the employer;
7. to disclose information to the employer;
8. to respect trade secrets;
9. to account for secret profits in that event;
10. to indemnify the employer for loss wrongfully caused by the employee; and
11. to generally maintain the confidence between him and the employer.

20. The Council also had implied duties, namely, the duty:

1. to pay agreed or usual wages;
2. to provide work or reasonable opportunity to earn the wages;

3. to take reasonable care regarding the employee's safety;
4. to indemnify the employee, and
5. generally not to undermine the confidence between the Council and employee.

21. Even when the explanations by the claimant are taken as true, it is not difficult to see that he was guilty of breach of some of his duties as an employee. Below are some examples.

22. The first example is when the supervisor gave lawful and reasonable instruction that only she and Mr. Ramclam would "settle cases" outside court. I think what is meant by settling is admission of guilt accompanied by payment of a modest fine. The claimant said he was not aware of the instruction circular. The Committee must have disbelieved that. I also disbelieve that. His written explanation and testimony suggested he was aware. Then he sought to refute the authority of the order by contending that if the supervisor and Mr. Ramclam were not present, "the work of the Council must go on". Factually, the actions that the claimant took in the cases of Mr. Mangar and of Mr. Nicholas were not because the supervisor and Mr. Ramclam were not present.

23. About withdrawing cases without authority of the supervisor and discussing cases with defendants in his office, the claimant was surprisingly obdurate. He said that it was his responsibility as a prosecutor, acting as a minister of justice, to decide whether to withdraw a case, it was not the responsibility of the supervisor. I need only say that he was wrong in that view, a junior minister takes instruction from a senior minister. The claimant indeed disregarded a lawful and reasonable order given on behalf of the Council.

24. That Mr. Mangar was charged with an offense said to have occurred on a future date, so the claimant had to withdraw the case was, in my view, a dishonest explanation. It is well known that in American expression of date, the month other than the day is written first. The claimant could have applied for amendment and adduced evidence to prove the amended date. He deliberately acted against the purpose of his employment. He betrayed the confidence reposed in him.

25. The incident concerning Ms. Tillett was not included in the report of the supervisor for consideration by the Disciplinary Committee. There is no evidence to show that the Committee took it into consideration. The claimant might have included the incident in answer to the report that he "entertained and coached" defendants or that he settled cases out of court, despite instruction to the contrary. The incident does not help his case. Instead, I would view it as an act of gross meddling in the duty and authority of the magistrate who had ordered the arrest of Ms. Tillett. The claimant had no authority to deal with the matter of the warrant of arrest, and there was no need to receive Ms. Tillett in the claimant's office. The clerk of the Court was the official whose duty it was to attend to Ms. Tillett. I do, however, regard the incident as irrelevant to this case as it was never considered by the Disciplinary Committee.

26. There had also been no report to the Committee that the claimant was not academically qualified for the post of prosecutor in the Municipal Court Department. The Committee would have not taken it into consideration. I exclude it from my judgment.

27. Having regard to the evidence, the Committee was entitled to believe the rest of the contents of the report, and to take the view that the acts of misconduct warranted dismissal of the claimant.

28. In my view, some of the acts of misconduct were breaches of fundamental conditions of the contract of service between the Council and the claimant and could singularly justify summary dismissal of the claimant. The Council waived the right to summarily dismiss the claimant on each of those occasions of grave misconduct, it could not, and rightly did not, claim the right retrospectively. Instead the Council acted on them as a series of misconducts on which to lawfully dismiss the claimant after warnings.

29. It is my conclusion that the claimant was never summarily dismissed or otherwise unlawfully dismissed. His claim is dismissed. He will pay the costs of these proceedings to Belize City Council.

Observation:

30. I wish to make two general observations. Firstly, I have perused the Labour Act, Cap. 85, Laws of Belize. It is hopelessly out of date. It was legislated or adopted for a different time, and for purposes that are no longer relevant. Application of some of its provisions could today cause injustice instead. In the Act "a worker" is defined as, *"any person who had entered into or works under a contract with an employer whether the contract be – (a) for manual labour, clerical work or otherwise….."* Are supervisory or managerial employees excluded? It is required that written contracts be registered with the Commissioner of Labour, is it practical today given the number of contracts of employment? What are the legal consequences other than penal consequence of not registering a written contract? Provisions about giving notice of termination of employment are in the part of the Act concerned with oral contracts only, what about notice in regard to written contracts? Are the periods of notice reasonable today? There are many more questions regarding the Act.

31. Secondly, Belize has adopted several international conventions concerning employment and labour. Several have not been incorporated into or reconciled with the provisions of the relevant existing statutes. Cases brought to Court continue not to take those conventions into account. This case is one example.

32. Delivered this Monday, the 28th day of April 2006
At the Supreme Court
Belize City

Sam Lungole Awich
Judge
Supreme Court of Belize