



In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2016: No. 9

BETWEEN:

RAYNORS SERVICE STATION

APPELLANT

-and-

EARLSTON BRADSHAW

RESPONDENT

JUDGMENT

(in Court)¹

Appeal from Employment Tribunal-unfair dismissal-dishonesty-primary findings by Tribunal that dishonesty not established-appellate function of court

Date of hearing: May 6, 2016

Date of Judgment: June 3, 2016

Mr. Saul Fromkin QC, BeesMont Law Limited, for the Appellant

Mr. Gordon Ricky Woolridge Jr., Phoenix Law Chambers, for the Respondent

¹ To save costs, the present Judgment was circulated without a formal hearing.

Introductory

1. The Employment Act 2000 creates an Employment Tribunal to resolve claims of, *inter alia*, unfair dismissal. Appeals from a decision to this Court are limited to appeals “*on a point of law*” (section 41(1)). On December 14, 2015, the Tribunal ruled that the Respondent had been unfairly dismissed by the Appellant.
2. The Respondent was summarily dismissed on the grounds that he had stolen a \$50 bill dropped by a customer. He contended that he only pocketed the money found inside the Service Station near the feet of a customer because he was serving other customers and wanted to ensure the money was returned to its true owner. It was common ground that he initially denied finding the money when initially approached by the customer inside the Service Station, but when approached by the same customer outside shortly afterwards, he handed over the \$50 note. The Tribunal found, after hearing oral evidence from both sides and examining video footage of the incident, that the Respondent was unfairly dismissed because, in all the circumstances, a reasonable employer would have given him the benefit of the doubt.
3. The Appellant appeals against the Tribunal’s decision (“the Decision”) on the following two main grounds:
 - (1) the Tribunal erred in law by misdirecting itself as to what the legal requirements of theft were in relation to the facts of the case;
 - (2) the Decision was against the weight of the evidence .

Misdirection in law

4. The Appellant primarily complained that the following findings were legally flawed:

“the action of temporarily placing the \$50 bill in one of his pockets, cannot rise to the level of theft as it was returned in the shortest period of time”.
5. Mr Froomkin submitted that this aspect of the Decision reflected an error of the law ignoring the doctrine of theft by finding. That submission seemed to me to be valid, based on a narrow reading of the words used. Theft can indeed potentially be committed in circumstances of a temporary taking where the thief has a change of heart when confronted with his crime.
6. In my judgment, however, this would not be a fair way to characterise the relevant finding in the context of the Decision and the proceedings as a whole. The only fair way to interpret that finding is as follows: “*In all the circumstances of the present case, what the Tribunal finds the Respondent did does not amount to theft.*” After all,

what was most significantly in dispute before the Tribunal was not what comprised the legal elements of theft but whether the Respondent had been acting dishonestly or not as a matter of fact.

7. This ground of appeal fails.

Decision against the weight of the evidence

8. Having reviewed the Record and viewed the video footage, it is impossible for this Court to fairly conclude that the central finding that a reasonable employer should have given the Respondent the benefit of the doubt is against the weight of the evidence. This was a finding it was open to the Tribunal to reach, having heard and viewed the evidence, including (most significantly) the cross-examination of the Respondent. It is easy to see why the Appellant is disappointed with having its view of the facts rejected. The Respondent's conduct was, in the absence of any reasonable explanation, quite clearly capable of being construed as amounting to theft. However, his explanation, combined with previous good character, was hardly one which should have been 'laughed out of court'. It is unsurprising, based on the way Mr Woolridge advanced the Respondent's case before this Court, that Tribunal reached the conclusion that it did.
9. As I commented in the course of argument, where a trier of facts sees and hears the witnesses and rejects an allegation of dishonesty, an appellate tribunal is in no place to reverse the primary findings reached by the fact-finding tribunal as the Judicial Committee of the Privy Council held in the Bermudian case of *Mutual Holdings (Bermuda) Ltd-v-Diane Hendricks et al* [2013] UKPC 13.
10. This ground of appeal also fails.

Disposition of Appeal

11. When entertaining appeals from statutory tribunals, this Court will generally be most reluctant to interfere with the primary factual findings made by the Tribunal where it was open to the Tribunal based on admissible evidence to reach those findings. It will not be enough for an appellant to demonstrate technical errors of law unconnected from any substantial injustice on the merits. The observations of LA Ward JA in a somewhat different context are probably of general application and bear remembering: "*The advancement of technical points which have more value as student examination questions should not be encouraged*" (*Interinvest Ltd. and Black -v-Dobie* [2010] Bda LR 41 at paragraph 13).

12. More directly relevant still, this Court’s appellate jurisdiction in the present case is (in the absence of any other rules specifically governing appeals under the Employment Act²) defined by Order 55 of the Rules of the Supreme Court which provides in salient part as follows:

“(7) The Court shall not be bound to allow the appeal on the ground merely of misdirection, or of the improper admission or rejection of evidence, unless in the opinion of the Court substantial wrong or miscarriage has been thereby occasioned.”

13. The appeal is dismissed. Unless either party applies to be heard as to costs within 21 days, the Appellant shall pay the Respondent’s costs of the present appeal, to be taxed if not agreed.

Dated this 2nd day of June, 2016 _____
IAN RC KAWALEY CJ

² Order 55 rule 1 provides:

“(4) The following rules of this Order shall, in relation to an appeal to which this Order applies, have effect subject to any provision made in relation to that appeal by any other provision of these rules or by or under any enactment.”