In The Supreme Court of Bermuda

CIVIL JURISDICTION

2010: No. 46

BETWEEN:

DANIEL DAVID MATTHEWS

APPELLANT

-and-

BANK OF BERMUDA LIMITED

RESPONDENT

JUDGMENT

Date of Hearing: July 6, 2010[1]

Date of Judgment: August 20, 2010

Mr. Richard Horseman, Wakefield Quin, for the Appellant

Ms. Fozeia Rana-Fahy, Mello Jones & Martin, for the Respondent

[1] The parties filed supplementary submissions on July 13, 2010.

Introductory

1. By Notice of Originating Motion dated Feb 12, 2010, the Appellant appeals against a decision against the Employment Tribunal dated January 26, 2010. The decision complained of is "*the decision that the Respondent was justified in terminating the Appellant's employment under Section 25 (a) (b) of The Employment Act 2000*". It is believed that this is the first or one of the first appeals under The Employment Act 2000.

2. The Appellant's Notice of Originating Motion sets out the following Grounds of Appeal;

   "2(i) The Appellant was originally terminated by the Respondent for serious misconduct under Section 25(a) of the Employment Act by letter of termination. There was no evidence presented such that the Tribunal could find that there was such conduct and therefore the tribunal erred in law in reaching such a decision.

   2(ii) The Tribunal erred in finding that the Respondent's alleged misconduct had a detrimental effect on the Respondent's business there being no evidence upon which to make such a finding;

   2(iii) The Tribunal erred in law by failing to advise the Appellant who was unrepresented and acting in person that he could summons witnesses to attend. The Appellant had requested that witnesses from the Respondent attend but they declined to do so. The Appellant was therefore denied the opportunity to properly put his case to the Tribunal;

   2(iv) The decision was so unreasonable that no reasonable tribunal could have made it considering the evidence;

   2(v) The Tribunal failed to give proper reasons or any sufficient reasons for the decision;"

3. The Employment's Tribunal was comprised as follows: Kenneth Richardson (Chairman); Gary Phillips and Edwin Wilson. The Chairman prepared typed notes of the hearing which constituted the Appeal's record in this matter. The record reveals that the Chairman advised the parties at the commencement of the January 19, 2010 hearing, that all decisions of the Tribunal were final and could only be appealed on a point of law.

4. The record also reveals that the Chairman invited the parties to make one last effort to reach a settlement before the proceedings began. The parties were asked if the intended to bring witnesses and the Bank indicated they would call one witness. The Appellant indicated that he'd asked several persons at the Bank to appear as witnesses on his behalf but they had declined. The parties were also advised that the burden of proof was on the employer to demonstrate that the termination of the Appellant's employment was justified; accordingly the Bank presented its case first.

5. The main broad issue which arose on the hearing of the appeal was whether or not the Tribunal's decision was essentially lawful based on its assessment of the facts or whether the decision could be fairly said to be wrong in law. Ms. Rana-Fahy urged the Court to be both mindful of the dominant philosophy of The Employment Act in vesting all factual matters in the discretion of the Tribunal and also emphasised the need for this Court to give guidance for future cases.

The Hearing

6. The Bank's case was that the Appellant failed to perform in the delivery of its Premier Banking Service in a satisfactory manner. This service was launched in 2007 as a high end banking service for customers with a portfolio in access of $250,000.00.

7. According to the Bank's witness, Mr. Fletcher, the mass affluent market, which the Appellant was trained and accredited as a trainer to service, was a critical service for the Bank. The nature of the service required responses to customers request to be delivered in an outstanding manner.

8. To monitor quality control, the Bank developed a mystery shopper program which all employees were aware. A mystery shopper would enter the bank whose staff would assume that he or she was a genuine customer, and prepare report on the quality of service delivered. On February 13, 2008, the Appellant was on duty and failed to meet the mystery shopper who attended the Bank despite being invited to do so by the receptionist. This incident was included in an internal report of March 11, 2008 for which the Bank received a very low grade, ranking it close to the bottom across a group of which it had previously been near the top.

9. The Appellant's defence went as follows. At the time of the mystery shopper incident in question, Mr. Fletcher had been allowed to go out looking for accommodation for his family. As a result, he was the only person on duty at the time in question and had other time sensitive issues to deal with. He also complained that the Bank ought to have ensured that a more experienced receptionist was on duty.

Had that been the case, he could have completed his critical assignment than serviced the client. He also suggested that all other relationship managers should not have been allowed to be off at the same time.

10. In closing submissions, Mr. Martin Law of the Bermuda Employer's Council for the Bank submitted that the complete failure to service the mystery shopper on February 13 (for which the Appellant was directly responsible) put the entire Premier Banking Service offered by the Bank in Bermuda at risk. Because of this the Appellant's services were terminated on March 17, 2008 on the grounds that his continued employment was no longer possible.

11. In the Appellant's closing submissions, he began by setting the background to his occupation of the post in question. He claimed that the Bank's witness, Mr. Fletcher had been appointed instead of him to a Senior Manager (Wealth Management) for which he was qualified. When he sought to challenge why the spouse of the Bank's senior Legal Counsel was preferred to him, he was told that if he pursued the matter it would be detrimental to his career. He also noted that a control system had been implemented requiring that no less than two Premier managers should be on station at any given time. This policy allowed for one manager for operational approvals and another for service issues when they arose.

12. On the day in question, the Applicant was told to miss his lunch hour as two other colleagues would be out. In addition Mr. Fletcher also went out to attend an appointment without informing the Appellant. At 12:45 p.m., certain mutual fund trades required approvals on an emergency basis. The Appellant dropped everything he was doing to deal with this matter and successfully obtained an extension to the original deadline. It was during this period of time that the mystery shopper attended his workstation, seeking to speak to a relationship manager about opening an account. The receptionist asked the Appellant if he could deal with the customer and the Appellant instructed the receptionist to invite the customer to either wait for a few minutes or to leave his contact details so that he could be contacted for an appointment. The mystery shopper left the Bank and was discovered not to be a genuine shopper when staff attempted to contact him later.

13. On March 17, 2008 in a meeting in the Human Resources, Mr. Fletcher and the Human Resources Officer handed the Appellant a dismissal letter which he declined to sign. He was then asked to leave the Bank and was escorted to his desk to collect his personal effects. The Appellant told the Tribunal that he felt that Mr. Fletcher, who was a work permit holder, had conspired to remove the Appellant who was a threat to his work permit.

14. According to the appeal record (at page 11) the Tribunal's summary of the submissions and decision was as follows:

> *"Summary of Submissions*
>
> ***Employer's Position:***
>
> *The Employer asserted in its submissions that the nature of the Employee's responsibilities were highly specialized, requiring specific handling of clients and prospective clients.*
>
> *It is the Employer's case that under "normal" circumstances this termination might appear harsh, but that the employee's failure to adhere to the well-established, and significantly important protocols, necessitated his dismissal as such had a detrimental effect on the employer's business.*
>
> ***Employee's Position:***
>
> *The Employee sought to demonstrate that the Employee wilfully ignored any form of due process in terminating his employ.*
>
> *Determination and Order*
>
> *The Tribunal heard and considered witness testimony as well as both written and oral submissions from the parties.*
>
> *The Tribunal has determined that given the distinctive nature of the specialized service the employer was justified in terminating the Employee under Section 25(a) and (b) of the Employment Act, 2000. No further compensation is awarded."*

Statutory framework

15. The present appeal against a decision of the Employment Tribunal is made under section 42 of the Employment Act 2000, which provides as follows:

> "***Appeals***
> *(1) A party aggrieved by a determination or order of the Tribunal may appeal to the Supreme Court on a point of law.*

(2) An appeal under subsection (1) shall be lodged in the Registry within twenty-one days after receipt of notification of the determination or order, or such longer period as the Supreme Court may allow.

(3) On any such appeal, the Supreme Court may make such order, including an order as to costs, as it thinks fit.

(4) Section 62 of the Supreme Court Act 1905 shall be deemed to extend to the making of rules under that section to regulate the practice and procedure on an appeal under this section.

(5) The lodging of an appeal under this section shall act as a stay of any order of the Tribunal."

16. As Ms. Rana-Fahy sought to emphasise throughout her submissions, the restriction of the right of appeal to points of law signifies that the Tribunal's judgment as to the facts before it should not (perversity apart) be disturbed by this Court.

17. Three areas of the statutory regime are significant to the present appeal. Firstly, it is necessary to apprehend the institutional framework within which the Tribunal is constituted. Secondly, it is pertinent to appreciate the jurisdiction and powers of the Tribunal; and thirdly it is important to understand the legal principles which govern the disposition of cases, such as the instant one, which come before the Tribunal.

COMPOSITION AND PROCEDURE OF TRIBUNAL

18. The composition of the Tribunal and its procedural powers are set out in the Schedule to the Act, which provides as follows:

THE EMPLOYMENT TRIBUNAL
CONSTITUTION OF TRIBUNAL

1 (1) The Tribunal shall consist of a Chairman, a Deputy Chairman and a panel of not more than twelve members, appointed by the Minister by notice published in the Gazette.

(2) Before exercising his powers under subparagraph (1), the Minister shall consult such trade unions and other organisations as appear to him to be representative of the views of employers and employees.

(3) For the purpose of determining any complaint or other matter referred to the Tribunal under this Act, the Tribunal shall be composed of—

(a) the Chairman or Deputy Chairman;

(b) one or two members selected by the Chairman to represent the interests of employers; and

(c) the same number of members selected by the Chairman to represent the interests of employees.

APPOINTMENTS

2. (1) The Chairman and Deputy Chairman of the Tribunal shall hold office for a period of three years, and may be reappointed from time to time for a like period.

(2) No person shall be qualified to be the Chairman or Deputy Chairman unless—

(a)he is a barrister and attorney of at least five years standing; or

(b)he has considerable experience in labour relations.

(3) The members of the panel shall hold office for a period of two years, and maybe reappointed from time to time for a like period.

(4) The Minister may at any time, by notice published in the Gazette, appoint a person to act in the place of any member of the panel who is absent from Bermuda or who is for any reason incapacitated, but shall not appoint a person to act as Chairman or Deputy Chairman unless that person is himself qualified under subparagraph (2).

(5) The Chairman, Deputy Chairman or any member of the panel may at any time, except during the course of proceedings before them under this Act, resign his appointment by notice in writing addressed to the Minister.

(6) The Chairman, Deputy Chairman and members of the panel shall be entitledto receive out of the funds appropriated by the Legislature for the purpose such fees and allowances as the Minister may determine.

VACANCIES

3. Where, during any proceedings, a vacancy occurs in the membership of the Tribunal it may, with the consent of all parties, continue to act notwithstanding the vacancy; and no act, proceeding or determination of a Tribunal shall be called in question or invalidated by reason of the vacancy.

ASSESSORS

4. In any proceedings the Chairman or Deputy Chairman of the Tribunal may, if he thinks fit, summon to the assistance of the Tribunal any person of skill and experience in the matter to which the proceedings relate who is willing to assist the Tribunal as an assessor.

TRIBUNAL AUTONOMOUS

5. In the exercise of the powers conferred on it by this Act, the Tribunal shall not be subject to the direction or control of any other person or authority.

PROCEEDINGS

6. Parties to any proceedings before the Tribunal may appear personally or be represented, by counsel or otherwise.

7. The Tribunal may impose reporting restrictions where it considers it necessary or desirable to protect the privacy of parties to a hearing.

8. The Arbitration Act 1986 shall not apply to any proceedings of the Tribunal or to any award made by it.

9. Save as otherwise provided by any provision of this Act or in regulations made by the Minister regulating the procedure to be followed by the Tribunal, the Tribunal shall regulate its own proceedings as it thinks fit."

19. It may be seen that the Chairman must be either legally qualified or experienced in labour relations; the other two panel members must be selected to represent the interests of employees and employers respectively. Where additional expertise is required, an "assessor" may be utilised. Parties can be represented by counsel or otherwise and the Tribunal may regulate its proceedings as it sees fit.

20. Surprisingly, no power to compel the attendance of witnesses is included in the Schedule. However, paragraph 5 ("TRIBUNAL AUTONOMOUS") protects the independence of the Tribunal emphasising its judicial character.

JURISDICTION AND POWERS OF TRIBUNAL

21. The main provisions of the Act dealing with the jurisdiction and powers of the Tribunal include the following Parts of the Act:

"PART V ENFORCEMENT

Inspectors

34. The Minister shall designate persons to be inspectors for the purpose of the enforcement of this Act and shall give every such person a certificate of his designation signed by the Minister and the person so designated.

Employment Tribunal

35. (1) The Employment Tribunal is hereby established.

(2) The Tribunal shall have jurisdiction to hear and determine complaints and other matters referred to it under this Act.

(3) The Schedule shall have effect with respect to the constitution of, and proceedings before, the Tribunal.

36. (1) An employee shall have the right to make a complaint in writing to an inspector that his employer has, within the preceding three months, failed to comply with any provision of this Act.

(2) A complaint may be made under this section by a trade union or other representative group on behalf of an employee.

(3) Where a group of employees having the same or substantially the same Interests has a complaint pursuant to this Act, one complaint may be made in a representative capacity.

Inquiry by inspector

37. (1) Where an inspector—

(a) receives a complaint under section 36; or

(b) has reasonable grounds to believe that an employer has failed to comply with any provision of this Act, the inspector shall, as soon as practicable, inquire into the matter.

(2) If, for the purposes of an inquiry under this Act, an inspector requires information which the employer, employee or any other person is likely to be able to supply, the inspector may, by notice in writing, require that person—

(a) to supply that information; and

(b) to produce such documents as may be specified and permit the inspector to take copies, on such date or within such period of time as may be specified in the notice.

(3) After making such inquiries as he considers necessary in the circumstances, the inspector shall endeavour to conciliate the parties and to effect a settlement by all means at his disposal.

(4) Where the inspector—
has reasonable grounds to believe that an employer has failed to comply with any provision of this Act; but is unable to effect a settlement under subsection (3),he shall refer the complaint to the Tribunal.

(5) Where, in relation to an employer, any relevant grievance procedure is established (whether under a contract of employment, collective agreement or otherwise) to deal with employees' complaints, the inspector shall not, except with the consent of all parties, attempt to settle the complaint under this section or refer the complaint to the Tribunal unless and until there has been a failure to obtain a settlement by means of that procedure.

Hearing of complaints by Tribunal

38. (1) As soon as practicable after the inspector has referred a complaint to the Tribunal, it shall hold a hearing and give the employer and employee, or their representatives, full opportunity to present evidence on oath and make submissions.

(2) In any claim arising out of the dismissal of an employee it shall be for the employer to prove the reason for the dismissal, and if he fails to do so there shall be a conclusive presumption that the dismissal was unfair.

(3) Where the employee claims constructive dismissal it shall be for him to prove the reason which made continuation of the employment relationship unreasonable.

Remedies: general

39. (1) Where the Tribunal determines that an employer has contravened a provision of this Act, it shall notify the employer and employee in writing of the reasons for its determination and shall order the employer—

(a) to do any specified act which, in the opinion of the Tribunal, constitutes full compliance with this Act;

(b) pay to the employee not later than such date as may be specified in the notice, the amount which the Tribunal has determined represents any

unpaid wages or other benefits owing to the employee.

(2) Where the Tribunal determines that an employer has not contravened a provision of this Act, it shall notify the employer and employee in writing of the reasons for its determination.

Remedies: unfair dismissal

40. (1) If the Tribunal upholds an employee's complaint of unfair dismissal, it shall award one or more of the following remedies—

(a) an order for reinstatement, whereby the employee is to be treated in all respects as if he had never been dismissed;

(b) an order for re-engagement, whereby the employee is to be engaged in work comparable to that in which he was engaged prior to dismissal, or other reasonably suitable work, from such date and on such terms as may be specified in the order or agreed by the parties;

(c) a compensation order in accordance with subsection (4).

(2) In deciding which remedy to award, the Tribunal shall first consider the possibility of making an order of reinstatement or re-engagement, taking into account the wishes of the parties and the circumstances in which the dismissal took place, including the extent (if any) to which the employee caused or contributed to his dismissal.

(3) Where the Tribunal finds that the employee engaged in misconduct notwithstanding the unlawful nature of the dismissal, it may include a disciplinary penalty as a term of the order for reinstatement or re-engagement.

(4) A compensation order shall, subject to subsection (5), be of such amount as the Tribunal considers just and equitable in all the circumstances, having regard—

(a) to the loss sustained by the employee in consequence of the dismissal insofar as that loss is attributable to action taken by the employer; and

(b) the extent to which the employee caused or contributed to the dismissal.

(5) The amount of compensation ordered to be paid shall be not less than—

(a) two weeks wages for each completed year of continuous employment, for employees with no more than two complete years of continuous employment;

(b) four weeks wages for each completed year of continuous employment, in other cases, up to a maximum of 26 weeks wages."

22. Section 35 establishes the Employment Tribunal, and confers upon it jurisdiction to "hear and determine complaints and other matters" under the Act. Complaints of contravention of the Act must in the first instance be made to an Inspector, an office created under section 34. Under section 37, the Inspector conducts an inquiry and attempts to effect a settlement. He will only refer a complaint to the Tribunal if his own settlement efforts, or efforts pursuant to any contractually applicable grievance procedure, fail to resolve the issue.

23. Section 38 creates a presumption in relation to claims arising out of dismissal that any dismissal, save for constructive dismissal, was unfair. Two sections deal with remedies. Section 39 ("general") and section 40 ("unfair dismissal"). Under section 39, the Tribunal may only determine that a contravention of the Act has occurred and order the employer to either (a) comply with the Act, or (b) pay any unpaid wages or other benefits to the employee. Section 40(1) empowers the Tribunal to order reinstatement, re-engagement and/or a compensation order.

PROVISIONS THE APPELLANT COMPLAINS WERE CONTRAVENED

24. The following portions of the Act apply to disciplinary action generally, summary dismissal and unfair dismissal. The summary dismissal provisions are specifically relevant to the present case but must be looked at in their broader statutory context:

Misconduct etc

Disciplinary action

24 (1) An employer shall be entitled to take disciplinary action, including giving an employee a written warning or suspending an employee, when it is reasonable to do so in all the circumstances.

(2) No employer may impose a fine or other monetary penalty on an employee except in cases where a requirement of restitution would be appropriate and where agreed on between the parties.

(3) In deciding what is reasonable for the purposes of subsection (1), regard shall

be had to—

(a) the nature of the conduct in question;
(b) the employee's duties;
(c) the terms of the contract of employment;
(d) any damage caused by the employee's conduct;
(e) the employee's length of service and his previous conduct;
(f) the employee's circumstances;
(g) the penalty imposed by the employer;
(h) the procedure followed by the employer; and
(i) the practice of the employer in similar situations.

(4) A complaint that disciplinary action is unreasonable may be made to an inspector under section 36.

Summary dismissal for serious misconduct

25. An employer is entitled to dismiss without notice or payment of any severance allowance an employee who is guilty of serious misconduct—

(a) which is directly related to the employment relationship; or

(b) which has a detrimental effect on the employer's business, such that it would be unreasonable to expect the employer to continue the employment relationship.

26. ***Termination for repeated misconduct***

(1) Where an employee is guilty of misconduct which is directly related to the employment relationship but which does not fall within section 25, the employer may give him a written warning.

(2) If, within six months of the date of the warning, the employee is again guilty of misconduct falling within subsection (1), the employer may terminate the employee's contract of employment without notice or the payment of any severance allowance.

(3) An employer shall be deemed to have waived his right to terminate under subsection (2) if he does not do so within a reasonable period of time after having knowledge of the repeated misconduct.

Termination for unsatisfactory performance

27. (1) Where an employee is not performing his duties in a satisfactory manner, the

employer may give him a written warning and appropriate instructions as to how to improve his performance.

(2) If the employee does not, during the period of six months beginning with the date of the written warning, demonstrate that he is able to perform his duties in a satisfactory manner and is in fact doing so, the employer may terminate his contract of employment without notice or the payment of any severance allowance.

Unfair dismissal

28. (1) The following do not constitute valid reasons for dismissal or the imposition of disciplinary action—

(a) an employee's race, sex, religion, colour, ethnic origin, national extraction, social origin, political opinion, disability or marital status;

(b) an employee's age, subject to any other enactment or any relevant collective agreement regarding retirement;

(c) any reason connected with an employee's pregnancy, unless it involves absence from work which exceeds allocated leave entitlement;
an employee's trade union activity;

(d) an employee's trade union activity;

(e) an employee's temporary absence from work because of sickness or injury, unless it occurs frequently and exceeds allocated leave entitlement;

(f) an employee's absence from work for any of the reasons mentioned in section 13 (public duties), or due to service as a volunteer fire officer;

(g) an employee who removes himself from a work situation which he reasonably believes presents an imminent and serious danger to life or health;

(h) an employee's participation in any industrial action which takes place in conformity with the Labour Relations Act 1975;

(i) the filing of a complaint or the participation in proceedings against an employer involving alleged violations of this Act.

(2) *The dismissal of an employee is unfair if it is based on any of the grounds listed in subsection (1).*

Derivation of statutory provisions

25. When construing legislation in Bermuda, which is more often than not based on foreign precedents, it is always desirable to identify what the antecedents of the relevant local provisions are. Ms. Rana-Fahy helpfully provided the Employment Bill 2000's Table of Derivations to explain the drafting history of the Act. This Table shows that the crucial provisions for the current appeal, section 24 ("Disciplinary action"), section 25 ("Summary dismissal for serious misconduct"), section 28 ("Unfair dismissal") and section 40 ("Remedies: unfair dismissal") are all based on corresponding provisions of the CARICOM Model Harmonisation Act regarding Termination of Employment ("the CARICOM Model Law"), which in turn implements International Labour Organisation Convention No. 158 of 1981 ("the ILO Convention").

26. In her Supplementary Submissions, counsel identified only Dominica and Guyana as having enacted legislation based on the Model Law which was substantially the same as section 25 of our own Act but indicated that no relevant decided cases could be found. However, from the extracts of Caribbean legislation supplied, it is apparent that elements of our section 25 may be found in section C59 of the Antigua and Barbuda Labour Code Act (Cap.27), section 32 of the Bahamian Employment Act and section 15 of the Saint Vincent and the Grenadines Protection of Employment Act.

Legal findings: appellate jurisdiction of Court

27. It is common ground that appeals only lie to this Court on points of law. I accept the Respondent's counsel's submission that due deference ought to be shown to the Tribunal's factual findings and that this Court should resist the temptation of blurring the lines between appealable errors of fact (findings which cannot be supported having regard to the evidence) and substituting this court's views of the facts under the guise of correcting errors of law. On the basis that the English Employment Appeal Tribunal can only entertain appeals from Industrial Tribunals, Ms. Rana-Fahy commended the jurisdictional test articulated for that Tribunal by McCowan LJ in the English Court of Appeal in *British Telecommunications plc-v-Sheridan* [1990] IRLR 27[2]:

> "*There is only an appeal to this court on a point of law and that is the difficulty in his way. The authorities on what is a point of law are endless, and they express the matter in all sorts of different ways, but it all in the end comes down*

[2] Lexis NexisTranscript, pages 4-5, citing Phillips J in *Bird & Sons Contractors Ltd.* [1976] 1 ITR 70 at 71.

to the same thing. An appellant who claims there is an error of law must establish one of three things: he must establish either that the Tribunal misdirected itself in law or misunderstood the law, or misapplied the law; or, secondly, that the tribunal misunderstood the facts, or misapplied the facts; or thirdly-and this again was put in all sorts of different ways-that although they apparently directed themselves properly in law, and did not mis-state, or misunderstand, or misapply the facts, the decision was 'perverse', to use a word which to modern ears sounds harsh, or (which is another way of saying the same thing) that there was no evidence to justify the conclusion which they reached.'

I have no difficulty in understanding and accepting the first and third , but I am bound to say for my part I have difficulty in accepting the second as a separate category. Either the second means nothing more than the third, or it means something less. If the latter, I would respectfully doubt if it can be right, since this would suggest that the Employment Appeal Tribunal is entitled to allow an appeal if it takes a different view of the facts from that of the Industrial Tribunal."

28. I adopt the above *dictum*, with which Ralph Gibson LJ and Lord Donaldson (MR) concurred. Lord Donaldson put the matter even more pithily in the same case:

> "*On all questions of fact, the Industrial Tribunal is the final and only judge, and to that extent it is like an industrial jury. The Employment Tribunal can indeed interfere if it is satisfied that the tribunal has misdirected itself as to the applicable law, or if there is no evidence to support a particular finding of fact, since the absence of evidence to support a finding of fact has always been regarded as a pure question of law. It can also interfere if the decision is perverse...*"[3]

29. In 1990 in England when the cited case was decided, however, the industrial tribunals (re-styled employment tribunal from in or about 1998) system had been established for more than 25 years with full-time panel members (including legally qualified chairmen), dedicated premises, and a substantial body of reported cases in specialist law reports (including some from the tribunal level, but mostly from the appellate level). An unofficial lay guide to the UK employment tribunals describes the hearing process as follows:

[3] Lexis Nexis Transcript, page 6.

"*If the case proceeds to a full hearing, the case is heard, subject to certain exceptions, by a Tribunal of three people, a legally-qualified Employment Judge, and two lay members. The lay members use their employment experience in judging the facts. During the hearing the Employment Judge is under a duty to ensure that the hearing is conducted fairly, taking into account both sides' submissions on the law and facts. Generally witnesses are called for both sides with witness statements being supplied in advance."*[4]

30. Bermuda's current Employment Tribunal has part-time staff, an experienced labour chairman (but, as permitted by the Act, a non-legally-qualified one), no record of published decisions and has been operating for only a few years without a single appellate and decision to guide it as to its functions[5]. Its factual findings must at this juncture be said to have earned somewhat less deference than their English tribunal counterparts at the time of *British Telecommunications plc-v-Sheridan* [1990] IRLR 27. This is not to suggest that the test for what constitutes a point of law should be diluted in any way. Rather, it is necessary to remember that whenever appellate tribunals are required to both (a) respect factual findings reached at the initial hearing, and (b) adjudicate whether the initial hearing met the requisite standards of fairness, the experience of the first instance tribunal is always (albeit often tacitly) taken into account. Or, to put it another way, the presumption of regularity with respect to the proceedings under review will inevitably be more difficult to displace in the case of an experienced tribunal dealing with legal and factual issues with which it is well familiar, and easier to displace when the converse is the case.

Legal findings: does summary dismissal constitute unfair dismissal under the Bermuda Employment Act?

31. Mr. Horseman submitted that the requirements for summary dismissal under section 25 of the Act were essentially the same as under the common law. Ms. Rana-Fahy submitted that section 25 was a self-contained provision prescribing a distinctive statutory form of summary dismissal which was unconnected from the Act's other provisions relating to unfair dismissal. Mr. Horseman in his Supplementary Submissions also contended that the present case was not one of unfair dismissal.

[4] Htpp://en.wikipedia.org/wiki/Employment_tribunal. This description conforms to my own experience of appearing as an advocate for the Free Representation Unit before industrial tribunals in London in the late 1970's and mid-to-late 1980's.

[5] Ms. Rana-Fahy advised that a digest containing case summaries did exist but conceded that these summaries shed no light on the legal principles applied.

32. I am unable to completely accept either of these submissions. I find that: (a) section 25 draws on the common law concept of wrongful dismissal, but (b) is part of a distinctive new statutory remedy of unfair dismissal, which requires the related provisions of the Act as well as its antecedents, namely the Model Law. I also find, not without some difficulty, that the Appellant's complaint ought properly to be construed as an unfair dismissal complaint, albeit one grounded primarily on an alleged breach of section 25 of the Act.

33. It is clear that the Act creates remedies for "*unfair dismissal*" (section 40(1)) and that this applies to any form of dismissal, be it constructive, on notice or summary. Section 38(2) provides: "*In any claim arising out of the dismissal of an employee it shall be for the employer to prove the reason for the dismissal, and if he fails do so there shall be a conclusive presumption that the dismissal was unfair*" (emphasis added). Section 28 (1) lists various prohibited grounds for dismissal; section 28(2) provides that dismissal for such prohibited reasons shall be deemed to be unfair. But that is not the sole way in which unfair dismissal may occur. Section 25 must be read with section 24 of the Act. Summary dismissal is the most severe form of disciplinary penalty known to employment law. Deciding whether misconduct which potentially justifies summary dismissal is "*such that it would be unreasonable to expect the employer to continue the employment relationship"* in my judgment brings into play the further consideration of whether summary dismissal would be a "reasonable" penalty within the principles set out in section 24.

34. Section 24(1) provides: "*An employer shall be entitled to take disciplinary action, including giving an employee a written warning or suspending an employee, when it is reasonable to do so in all the circumstances.*" Section 24 (2) then lists the factors which must be considered in determining whether a penalty is reasonable:

> "*(a) the nature of the conduct in question;*
> *(b) the employee's duties;*
> *(c) the terms of the contract of employment;*
> *(d) any damage caused by the employee's conduct;*
> *(e) the employee's length of service and his previous conduct;*
> *(f) the employee's circumstances;*
> *(g) the penalty imposed by the employer;*
> *(h) the procedure followed by the employer; and*
> *(i) the practice of the employer in similar situations.*"

35. Section 24(4) states that a complaint that a penalty is unreasonable may be referred to an inspector under section 36. In my judgment this must include a complaint that a summary dismissal is unreasonable because: (a) section 36 itself states in broad terms

that any complaint that a breach of the Act has occurred may be referred to an inspector (who may in turn refer it to the Tribunal; and (b) section 40 provides "*remedies for unfair dismissal*". The term "*unfair dismissal*" is admittedly defined by section 3 in such a way as to apply solely to dismissal for a reason prohibited by section 28 and to constructive dismissal under section 29: "*'unfair dismissal' has the meaning given in sections 28 and 29*". It is impossible to believe that Parliament intended to make available the wide-ranging remedies under section 40 of the Act to cases of termination in breach of section 28 and 29 but to withhold them from terminations in breach of section 25. An express termination in breach of the Act must be regarded as a more egregious breach of the statute than an implied termination. Moreover, sections 28 and 29 do not assign meanings to the term "unfair dismissal", but provide for circumstances in which a dismissal will be deemed to be unfair. This narrow definition of "unfair dismissal" is in any event inconsistent with another important provision of the Act:

> "**Hearing of complaints by Tribunal**
> *38. (1) As soon as practicable after the inspector has referred a complaint to the Tribunal, it shall hold a hearing and give the employer and employee, or their representatives, full opportunity to present evidence on oath and make submissions.*
>
> *(2)* ***In <u>any claim</u> arising out of the dismissal of an employee it shall be for the employer to prove the reason for the dismissal, and if he fails to do so there shall be a conclusive presumption that the dismissal was unfair.***
>
> *(3) Where the employee claims constructive dismissal it shall be for him to prove the reason which made continuation of the employment relationship unreasonable.*" [emphasis added]

36. One cannot sensibly construe the term "*any claim arising out of the dismissal of an employee*" in subsection (2) of section 38 as limited to cases falling under section 28 alone, because the term "*any claim*" suggests more than one species of claim. And section 38(3) makes separate provision for the burden of proof in relation to claims of constructive dismissal. Either section 38 (2) applies to summary dismissals under section 25, and by necessary implication characterises unlawful summary terminations as "unfair dismissals", or Parliament must be deemed to have made no express provision for the burden of proof in relation to summary dismissals at all. I would resolve these ambiguities (if they may properly be characterised as such) in favour of giving employees the most ample and generous rights, consistent with the policy underlying the antecedents of the legislation, not to mention the Act itself.

37. The pro-employee policy underlying the Act is reflected in the fact that the crucial provisions of the Act are derived from the CARICOM Model Law, which in turn is intended to give effect to the ILO Convention. Article 4 of the Convention provides as follows:

> "*The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.*"

38. There is nothing in the Convention which suggests that remedies for unlawful termination should be wholly different in cases of summary and non-summary termination. Nor indeed can it be suggested based on the Convention that remedies for invalid terminations should only be granted where termination is based on prohibited grounds. Article 5 of the Convention lists various prohibited grounds for termination, but makes it clear that the list is a non-exhaustive one. Article 7 of the Convention also imports the requirement of a reasonable procedure before dismissal occurs as a general rule:

> "*The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.*"

39. Article 8 of the ILO Convention requires parties to provide a remedy for all forms of unjustified termination of employment:

> "*1. A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.*"

40. Sections 24, 25, 28, 29 and 40 of the Bermuda Act are all derived from the CARICOM Model Law (sections 29, 18, 16 and 32, respectively). The definitions section of the Model Law does not define the term "unfair dismissal" at all; section 3 of the Bermuda Act is derived from multiple sources. However, since the crucial provisions for present purposes are derived from the CARICOM Model Law, it is important to apprehend what the term "unfair dismissal" means in this instrument. It is also noteworthy that although the Derivation Table attached to the Bill which gave birth to the Act describes section 38 as a "new" provision, it is, for present purposes

at least, consistent with section 32 of the Model Law. This provision, like section 38, places the burden of proving that the dismissal was fair generally on the employer, but on the employee in cases of constructive dismissal.

41. Accordingly, it is clear from the following provisions of the CARICOM Model Law that the term "unfair dismissal" applies in that legislation to all forms of termination alleged to be unjustified:

> "***Complaints of unfair dismissal***
>
> *30 (1) Within 6 months of the date of dismissal, an employee shall have the right to complain to the appropriate national judicial body that he or she has been unfairly dismissed, whether notice has been given or not.*
>
> *(2) The right of an employee to make a complaint under this section shall be without prejudice to any right the employee may enjoy under a collective agreement.*
>
> ***Burden of proof***
>
> *31 (1) In any claim or complaint arising out of the dismissal of an employee it shall be for the employer to prove the reason for the dismissal, and if the employer fails to do so there shall be a conclusive presumption that the dismissal was unfair.*
>
> *(2) In the circumstances mentioned in section 17 it shall be for the employee to prove the reason which made the continuation of the employment.*"

42. In my judgment it is ultimately clear that the Appellant's claim for unfair summary dismissal in breach of section 25 of the Act fell within the ambit of termination claims to which, *inter alia*, sections 38 and 40 apply. In resolving the conflict between the narrow definition of "*unfair dismissal*" and the substantive provisions of sections 24, 25, 38 and 40, I have also adopted the approach of the Eastern Caribbean Court of Appeal to a somewhat similar ambiguity in the Antiguan case of *Universal Caribbean Establishment-v-Harrison*, Suit No. 21 of 1993, Judgment dated November 24, 1997. In this case, where the Court rejected a technical construction which would have excluded the employee's right of recourse to the tribunal, Acting Chief Justice Dennis Byron observed:

"*...where the main object and intention of a statute is clear, it should not be reduced to a nullity by a literal following of language, which may be due to want of skill or knowledge on the part of the draftsman, unless such language is intractable.*"

Legal findings: the essential elements of a valid summary dismissal

43. To comply with section 25 of the Act, the employer must prove that the summary dismissal was for misconduct which either (a) "*is directly related to the employment relationship*" (section 25(a)), or (b) "has a detrimental effect on the employer's business" (section 25(b)), and that (c) "*it would be unreasonable to expect the employer to continue the employment relationship.*" In deciding whether it was reasonable for the employer to conclude that the employment relationship had to be brought to an immediate end, the Tribunal must in my judgment effectively consider whether the penalty of summary dismissal was reasonable, having regard to the matters set out in section 24(3). Apart from the fact that the source of these requirements are statutory and that distinctive remedies (most notably, reinstatement and re-engagement) are available under the Act which are not available at common law, the requirements for a valid summary dismissal under the Act and at common law appear to me to be substantially the same.

44. It follows that in most cases there will be little controversy over whether the requirements of section 25 (a) or (b) are met, cases where some impermissible ulterior motivation for terminating is alleged apart. Assuming the impugned dismissal was admittedly based on alleged misconduct of some sort, as in the present case (the suggestion of conspiracy apart), controversy will typically turn on whether the conduct complained of was sufficiently serious to leave the employer no choice but to bring the employment relationship to an end. In *Dundee Leeds Management Services-v-Nitin Aggarwal* [2007] Bda LR 47, a common law wrongful dismissal case upon which Mr. Horseman relied, Evans JA observed after reviewing various tests:

"*That test...emphasises the basic importance of the relationship of trust and confidence between the parties in the particular case. The Court asks itself whether the misconduct relied upon was sufficiently serious to be regarded as repudiatory of that relationship; if it was, the employer was justified in bringing it to an end.*" [6]

[6] Page 6, paragraph 30.

45. Justice Indra Hariprashad-Charles of the Eastern Caribbean Supreme Court (BVI High Court) in Claim No. BVIHCV2007/0122, *Elphina Abraham-v-Sunny Caribbee Herbal and Spice Co. Ltd*, Judgment dated April 29, 2010, observed as follows:

> "[23] *Learned Counsel cited the Privy Council case of* ***Henry v Mount Gay Distilleries Limited (Barbados)*** *where summary dismissal was justified as the employee refused or failed to comply with his duty and was bold in his actions, showing a deliberate flouting of his instructions in failing to notify either the police or his employers of a possible break-in. The Court stated: (at para. 8):*
>
> > *'It is well established that summary dismissal is only justifiable where there has been a breach of one or more duties of the employee and such breach constitutes a repudiation of the contract of employment as being inconsistent with the continued employment of the employee. Thus a single act of carelessness or negligence can provide grounds for summary dismissal if the negligence itself or the circumstances surrounding it show that there has been a "deliberate flouting of the essential contractual conditions:' Laws v. London Chronicle Limited [1959] 2 All E.R. 285 at p. 287.*"

46. In the same case (at paragraph 32), Justice Hariprashad-Charles cited a case on summary dismissal under the BVI Labour Code ("*which permits the termination of employment where the employee has been guilty of misconduct in or in relation to his employment so serious that the employer cannot reasonably be expected to take any course other than termination*") as a useful guide to the common law position. This illustrates the fact that in many cases what constitutes grounds for summary dismissal under section 25 of the Act and at common law will be, as Mr. Horseman submitted, essentially the same.

Findings: did the Tribunal err in law by reaching a decision which was perverse or not supported by the evidence?

47. I reject the complaints (grounds (i), (ii) and (iv)) that: (a) there was no evidence of serious misconduct; (b) no evidence of detriment to the Respondent's business; and (c) that the decision was perverse. Depending on the view the Tribunal took of the evidence, I find that it was, albeit marginally and assuming the Tribunal directed itself correctly as to the law, open to the Tribunal to find that the failure to serve the mystery shopper constituted serious misconduct which was directly related to the employment relationship.

48. It was not necessary for the Respondent to prove detriment as subsections (a) and (b) of section 25 are disjunctive. In the case of a major international bank, if not generally, I would if required find that "*detrimental effect on the employer's business*" is a fluid enough concept to encompass damage to the internal performance

ranking of a local branch which potentially threatens its ability to offer a particular service.

49. If the Tribunal found, for instance, that the Appellant had deliberately refused to serve the client, knew how important his personal attention to the customer was in circumstances where he was not occupied with other pressing duties as he contended, such findings were potentially open to the Tribunal to reach and would have been supportive of proof of serious misconduct.

Findings: did the Tribunal err in law by failing to advise the Appellant of his right to subpoena witnesses?

50. This ground was not pursued. As Ms. Rana-Fahy rightly submitted, the 2000 Act contains no power to subpoena witnesses. This complaint must be rejected.

Findings: did the Tribunal misdirect itself in law as regards what the Respondent had to prove to justify the summary dismissal?

51. The Appellant complained (ground (v)) that the Tribunal erred in law by failing to consider the "*sole question…did the allegations amount to serious misconduct…such that it was unreasonable to continue to employ him"*. When what I regard as surplus verbiage is excised from the original ground (v), the most important complaint (identified in the course of the hearing) may be discerned. With the greatest of respect to the Tribunal, it is impossible to fairly conclude from the brief decision that the correct test was applied in arriving at the conclusion which was reached. The ground also overlaps to a great extent with the complaint that insufficient reasons were given for the decision (ground (v)). There are two significant concerns.

52. Firstly, the Summary of Submissions gives no comfort that the Tribunal appreciated that the main legal threshold the Respondent had to meet was to prove that the misconduct relied upon justified the dismissal. The "Employer's Position" was summarized as emphasizing the detriment element of section 25 (b) without any explicit reference to why the conduct in question (detriment apart) was so serious as to make it unreasonable to continue the employment relationship. The "Employee's Position" was summarized as complaining solely of a lack of due process. Yet the most important aspects of the Appellant's evidence are not mentioned: (a) his explanation as to being busy (which was not seemingly contradicted by any other evidence); (b) his assertion that the Bank's own policies were infringed by the absence of any managerial support for him on the desk; (c) his suspicion that he had been set up combined with the fact that the Bank's only witness was seemingly absent from the work station on an unscheduled basis just when the mystery shopper visited the Bank. These matters were recorded in the notes of the January 19, 2010 hearing; but how the Tribunal resolved these issues was not set out in the Decision communicated to the parties on January 26, 2010.

53. Secondly, the operative part of the Decision, referred to above, simply provided as follows:

> "*Determination and Order*
>
> *The Tribunal heard and considered witness testimony as well as both written and oral submissions from the parties.*
>
> *The Tribunal has determined that given the distinctive nature of the specialized service the employer was justified in terminating the Employee under Section 25(a) and (b) of the Employment Act, 2000. No further compensation is awarded."*

54. In my judgment it is impossible for this Court to fairly infer from the Decision made by a lay Tribunal with neither the assistance of a legally-trained assessor nor submissions by counsel that the Tribunal properly directed itself as to the law applicable to the Appellant's case. While the notes of the hearing make it clear that the Tribunal was aware of the burden of proof, there is nothing in the Decision which points with any conviction to the conclusion that the Tribunal had regard to the essential legal elements of section 25 as read with section 24 of an Act which is far from straightforward to interpret. These elements called for an assessment of far more than how seriously the Respondent regarded the misconduct in terms the detriment it caused or threatened to its business interests.

55. The essential legal elements of unfair dismissal raised by the facts of the Appellant's case required the Tribunal to determine whether, inter alia: (a) the conduct the Bank complained of was an act of simple negligence or deliberate misconduct; (b) how similar misconduct had been punished in respect of other employees in the past; (c) what the employee's work record was, good or bad; and (d) whether the Bank's systems had to any extent broken down and/or whether other employees were partially at fault for the poor service complained of. Depending on the findings made in relation to issues such as these, the Tribunal could have either upheld or rejected the Appellant's complaint.

56. I find that the Tribunal erred in law by failing to direct itself to the legal requirements of the Act which were most important to the Appellant's complaint and/or by failing to record sufficient reasons for its decision.

57. For completeness I should note that I have taken full account of the various English authorities cited by the Respondent's counsel to the general effect that legalistic judgments need not be given by employment tribunals. The persuasive weight to be given to those authorities is, as already alluded to above, weakened by the fact that

the Bermuda Tribunal has yet to establish a comparable track record of experience to its English counterparts. Nevertheless, even if I were to follow slavishly the English approach, the Decision here would fail to meet the minimum requirements for demonstrating that no mis-directions as to the law occurred. As the President of the Employment Appeal Tribunal, Morison J, opined in *Chief Constable of Thames Valley Police –v-Kellaway* [2006] IRLR 170:

> "*Whilst we would not condone a tribunal decision which does not set out the relevant legal position and does not make findings of fact on all the principal submissions made, this does not amount to an automatic ground of appeal. It has to be shown that omitting to set out the legal principles or key submissions made has led to a consequent error of law or incorrect finding of fact.*"[7]

58. In the present case the failure to set out the relevant legal position and key submissions makes it reasonably clear that the Tribunal erred in law in its approach to the legal requirements for justifying a summary termination and accordingly made no findings of fact at all on the issues which might otherwise have supported its decision. The Decision as formulated, in a case where the Respondent's success seems a somewhat surprising outcome on facts which the Bank's representative conceded did not appear at first blush to support a valid summary dismissal, is accordingly unsustainable.

Conclusion

59. Accordingly, the Appellant's appeal is allowed and the decision of the Employment Appeal Tribunal of January 26, 2010 is quashed. The matter is remitted to the Tribunal for the issue of compensation to be dealt with pursuant to section 40 of the Act.

60. In this case the lay Tribunal was confronted with a case which was not presented by lawyers and the facts of which lay on the margins of serious misconduct. This gave rise to the need, which might not arise in more straightforward cases, for a careful assessment of the legal requirements of the statute so that (a) the Appellant's understandably legally incoherent case could be properly filtered, and (b) what the Respondent had to prove could be properly identified. This placed the Tribunal in an extremely difficult position.

61. Until the law and practice under the Employment Act 2000 matures, the Tribunal (as long as there is a lay chair and/or in cases where both parties appearing are not legally

[7] Lexis Nexis transcript, page 8.

represented) may wish to consider using their power under paragraph 4 of the Schedule to the Act to seek the assistance of a legally-qualified assessor. Such an assessor could perform a role similar to a clerk to lay justices in the English Magistrates' (or District) courts. Paragraph 4 provides:

> "*In any proceedings the Chairman or Deputy Chairman of the Tribunal may, if he thinks fit, summon to the assistance of the Tribunal any person of skill and experience in the matter to which the proceedings relate who is willing to assist the Tribunal as an assessor.*"

62. In addition, consideration might perhaps be given to producing the sort of information booklets which can be found on the websites of the British Employment Tribunals which can inform both lay members of the public and tribunal members of the law and practice applicable to proceedings under the Act.

63. The absence of a power to subpoena witnesses in my judgment is a material (and surely accidental) omission from the act which undermines the quality of justice afforded to employees seeking relief under the Act. Because of fears of retribution, it seems obvious that it will often occur that co-workers who can give material evidence will not voluntarily attend to give evidence against their employer. It is to be hoped that the Legislature will soon see fit to cure this gap in the otherwise apparently satisfactory Employment Tribunal procedural regime.

64. I will hear counsel as to costs. However, there is no obvious reason why the successful Appellant should not be awarded the costs of the appeal.

Dated this 20th day of August, 2010 _____

KAWALEY J