In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2013: No. 67

IN THE MATTER OF THE EMPLOYMENT ACT 2000

AND IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF THE EMPLOYMENT TRIBUNAL DATED 11 JANUARY 2013

FRANCES STEWART **Appellant**

-v-

FAIRMONT HAMILTON

Respondent

JUDGMENT

(in Court)

Date of hearing: June 7, 2013
Date of Judgment: June 14, 2013

Mr. Kyle Masters, Trott & Duncan Limited, for the Appellant
Mr. Kim White, Cox Hallett Wilkinson Limited, for the Respondent

Introductory

1. By Notice of Originating Motion dated March 5, 2013, the Appellant, formerly a Payroll Administrator employed by the Respondent, appealed against the decision of the Employment Tribunal on January 11, 2013 dismissing her complaint about the legality of her summary dismissal on April 23, 2012. The offence for which she was summarily dismissed was "gross negligence" in that she forwarded an email to the entire management team without editing out confidential salary information. She not only lost her primary position but also her part-time job with the Respondent's Housekeeping Department. The Respondent lost several employees as a result of the breach of confidence which occurred.

2. There was one ground of appeal:

> "*That the Employment Tribunal erred in law by failing to consider whether the penalty of summary dismissal suffered by the Appellant was reasonable in all the circumstances and/or having regard to the following matters as require by section 24(3) of the Employment Act 2000, namely:*
>
> *a. The length of the Appellant's Service and her previous conduct;*
> *b. The procedure followed by the Respondent in respect of the discipline by failing to discipline other members of staff in respect of the incident;*
> *c. The nature of the Appellant's conduct;*
> d. *The conduct of the Employer in similar situations.*"

3. The Appellant sought an extension of time within which to appeal because the 21 days prescribed expired on February 1, 2013. The explanation for the delay of just over one month deposed to by the Appellant was that she was abroad for most of January and learned of the decision at the end of January from her Union representative. She then relied upon the Union to instruct counsel to file the appeal.

4. The Respondent opposed both the extension of time application and the merits of the appeal. Those merits turn on whether or not my analysis of section 25 of the Act in *Matthews-v-Bank of Bermuda Limited* [2010] Bda LR 56 (which the Tribunal clearly did not follow) was correct or whether this case was wrongly decided.

5. Mr. White vigorously challenged the *Matthews* decision but Mr. Masters succeeded in neutralising this challenge. In circumstances where the Appellant has a meritorious appeal and the delay has been explained, albeit in a marginally satisfactory manner, and the delay is not excessive, the fundamental right of access to the Court must trump

procedural formalities. The Tribunal has adopted the commendable practice of concluding its decisions with the following words:

> "*The parties have been advised that the Determination of the Employment Tribunal is final but that such Determination may, as set out in section 41of the Employment Act 2000, be appealed to the Supreme Court on a point of law.*"

6. Although in this case the Bermuda Industrial Union which represented the Appellant at the hearing ought to have known the time limit for appealing, it might be helpful for the Tribunal to expressly include a reference to the 21 day time limit for appealing at the end of its written decisions. The Court cannot ignore the fact when parties are not legally represented before the Employment Tribunal, determining whether the Tribunal has erred in law will require the prospective appellant to obtain legal advice. This will typically be less than straightforward for an impecunious employee, whether they have the assistance of a Union or not. On balance, the delay has been satisfactorily explained in the present case by the fact that:

   (a) the Appellant happened to be abroad when the decision was circulated and only discussed it with her Union representatives near the end of the period for appealing;

   (b) the Appellant relied upon her Union to instruct attorneys and file an appeal;

   (c) this process took approximately one month, which is longer than the time limit itself but, marginally, not in the circumstances (taking into account the merits of the appeal) an unreasonable period of time.

7. The Appellant's application for an extension of time within which to appeal is granted.

The decision

8. In the Tribunal's Decision under the heading '*Summary of Submissions*', the Tribunal correctly stated:

> "*The burden in this alleged breach of Section 25 of the Employment Act 2000 is upon the Employer to demonstrate that the conduct or action of the Employee was so egregious that no form of discipline other than Summary Dismissal for Serious Misconduct was appropriate.*"

9. The pivotal question in this appeal, however, is what factors must be taken into account in order for the Tribunal to reach a valid decision that, objectively viewed, summary dismissal was or was not appropriate. The way in which the Tribunal defined its role was as follows:

> "*Given that the action of the Employee is undisputed, the task before the Tribunal is to determine the relative weight of the Action or Conduct of the Employee as well as its impact upon the business enterprise-such that the Employer considered no option less than invoking Section 25 of the Employment Act 2000, that of Summary dismissal for Serious Misconduct.*
>
> *While the Tribunal is sensitive, principally by* [sic] *the key testimony of the Employee that the action may well have been out of character, it is unable to set aside the serious damage caused by the disclosure and circulation of the highly sensitive information to unauthorized personnel.* "

10. The '*Determination of the Employment Tribunal*' simply stated in material part as follows:

> "*…the decision of the Employer to terminate the employment relationship in accordance with section 25 of the Employment Act 2000 is upheld…*"

11. On the face of the Decision, it is plain that:

(a) the Tribunal did not expressly consider section 24 of the Act and the reasonableness requirements; and

(b) the Tribunal defined its legal duty as determining not whether, objectively viewed, the decision to summarily dismiss was a reasonable one. Instead the Tribunal appears to have defined its task as to decide:

(i) whether the conduct complained and its impact on the business was sufficiently serious to justify a penalty of summary dismissal; and

(ii) whether the employer subjectively considered summary dismissal was the only appropriate penalty.

Findings: the legal requirements for summary dismissal under the Employment Act

12. Mr. Masters for the Appellant submitted that the Tribunal erred by failing to apply the guidance provided by this Court in *Matthews-v-Bank of Bermuda Limited* [2010] Bda LR 56. The statutory provisions which I considered in that case and which were referred to in argument in the course of the present appeal included the following:

> "***Misconduct etc***
>
> ***Disciplinary action***
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> *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."* [emphasis added]

13. In that case, I held that the effect of the relevant statutory scheme was as follows:

> "*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.*" [emphasis added]

14. These observations, made almost three years ago, apply with equal force to the Decision in the present case. This is a classic case of, to use the popular tautological phrase, "*deja vue* all over again". The Tribunal in the present case made no findings on, in particular, the following issues which were relevant to whether the summary dismissal penalty was, objectively viewed reasonable:

    (a) was the circulation of the confidential material simple negligence or, as alleged, gross negligence;

    (b) was the Appellant's work record good or bad? In particular, how exceptional an error was this (e.g. how many times had she sent out emails without

offending material compared to the number of times she had circulated inappropriate material?);

(c) were other persons in the wider corporate group involved with the forwarding of the email to the Appellant partly to blame? In particular, how frequently did the Appellant receive confidential material which she had to edit out as contrasted with how often she received emails which she could forward without editing; and

(d) (a point wryly noted by Mr. Masters) was the damage which flowed from the circulation of the unedited email caused at least in part by an unreasonably inequitable salary policy and, if so, to what extent (if any) did this mitigate the seriousness of the Appellant's misconduct?

15. The only distinction between this case and *Matthews* is that the Respondent's counsel appeared for the employer before the Tribunal while in *Matthews* neither party was legally represented. However, it seems obvious from the record and the approach that he adopted on the present appeal, that Mr. White did not refer the Tribunal to. Instead he encouraged the Tribunal to adopt a view of its jurisdiction which assumed that the decision in the 2010 case had been wrongly decided. It was not open to the Tribunal to disregard a decision of this Court which has not been reversed by the Court of Appeal. There is no room for this Court to assume that the Tribunal properly directed itself as to the applicable law when it is unarguably clear that it did not.

16. However, Mr. White sought to persuade this Court to hold that *Matthews* was wrongly decided and that all the Tribunal had to determine was, in effect, whether the disciplinary offence was sufficiently serious to potentially warrant dismissal without any regard to whether the employer's decision to dismiss was objectively reasonable in the circumstances. This Court is not bound by its earlier decisions and should not shirk from departing from any earlier decision it subsequently considers to be wrong.

17. The Respondent's counsel supported his submission that *Matthews* was wrongly decided with the argument that it resulted in an interpretation of the Act which radically altered the common law concept of wrongful dismissal. As the purpose of the 2000 Act was to create a new statutory remedy of unfair dismissal which did not exist at common law, it makes no sense to construe the statute narrowly so as to equate the availability of the statutory claim of unfair dismissal with the common law concept of wrongful dismissal. It is true that the statute introduces new remedies as well. But in my judgment the relevant statutory provisions must be construed on their own merits.

18. Mr. White more substantively submitted that the only reasonableness test which applied was to be found within the four corners of section 25 without regard to section 24(1), (3) and required the Tribunal to determine whether the penalty fell within the range of reasonable responses which a reasonable employer might adopt. He relied in this regard on, *inter alia*, the English Court of Appeal decision in *Post Office-v-Foley*[2001] 1 All ER 550 and *Trusthouse Forte (Catering) Ltd-v-Adonis* [1984] IRLR 384 (Employment Appeal Tribunal). These cases are persuasive authority which I would follow to this extent. It is not for the Employment Tribunal (or, indeed, this Court) to substitute its view for what the appropriate disciplinary action ought to have been provided that dismissal fell within the range of penalties that a reasonable employer might have imposed. This principle was acknowledged in the *Matthews* case but does not relieve the Tribunal of the obligation to determine what factors a reasonable employer would have taken into account before reaching the impugned decision.

19. In the *Post Office* case, the English Court of Appeal also considered the implications of section 98(4) of the Employment (Rights) Act 1996 (UK), which states that fairness "*(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee*". Mummery LJ held that:

> "*38. In accordance with s98(4) …the tribunal considered whether the Post Office had established reasonable grounds for its belief that Mr Foley was guilty of misconduct and that it had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.*"

20. In the *Trusthouse Forte* case, the Employment Appeal Tribunal (at paragraph 18) affirmed the rule that the merits of the dismissal decision are not reviewable provided the decision falls within the range of reasonable decisions. But they added:

> "*Further we think that what the Tribunal was doing was not substituting its own view but applying the test of the reasonable employer and saying that, in all the circumstances, the reasonable employer would not have reached the particular conclusion reached by Trusthouse Forte and that the long service and good conduct of the employee were outweighed by the fact that a serious offence had taken place.*"

21. These decisions merely demonstrate that justifying a dismissal has two dimensions to it. Firstly demonstrating that the employee's conduct was from the employer's vantage point

a serious breach of contract justifying dismissal. And, secondly, demonstrating that the employer in objective terms acted reasonably in deciding that a dismissal was required.

22. Section 25 of the Bermudian Employment Act in my judgment requires an employer seeking to justify a summary dismissal to do more than demonstrate that its decision was not perverse. The employer must also demonstrate that it acted reasonably in arriving at the summary dismissal decision. And section 24 of the Act, with reference to disciplinary action of all kinds, spells out the matters which must be taken into account to satisfy the statutory requirements of reasonableness in the disciplinary sphere. Those factors are not to be applied mechanically to each and every case; some factors will be more significant in some cases than in others.

Conclusion

23. In the present case, as in *Matthews-v-Bank of Bermuda Limited* [2010] Bda LR 56, the Tribunal did not consider and make findings on the objective reasonableness of the dismissal decision either applying the statutory criteria in section 25 as read with section 24(3) of the Act or at all. This was a fundamental error of law which invalidates the decision that the dismissal was justified within section 25 of the Act. It is not possible for this Court to determine whether the summary dismissal decision fell within the range of decisions which a reasonable employer might have made.

24. The decision of the Tribunal is accordingly quashed and the matter remitted for rehearing before a differently constituted panel.

25. I will hear counsel as to costs although there is no obvious reason why costs ought not to follow the event.

Dated this 14th day of June, 2013 _____
IAN R.C. KAWALEY CJ