In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2016: Nos. 51 and 346

BETWEEN:

ELBOW BEACH HOTEL BERMUDA

APPELLANT/RESPONDENT

-v-

HEIDI LYNAM

RESPONDENT/APPELLANT

JUDGMENT

(in Court) [1]

Date of hearing: November 1, 2016
Date of Judgment: November 18, 2016

Mr. Shawn Crockwell, Chancery Legal, for the Appellant/Respondent ("the Employer")
Ms. Sara-Ann F. Tucker, Trott and Duncan Limited, for the Respondent/Appellant ("the Employee")

Introductory

1. The Employment Tribunal on or about August 17, 2016 found that the Employee had been unfairly dismissed because summary dismissal was not justified and awarded her

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

compensation in the amount of three months' wages ("the Decision"). The Employer appealed against the Decision, by Notice of Appeal dated September 7, 2016. The Tribunal also found that the Employee contributed to her dismissal. The Employee appealed against the compensatory aspects of the Decision and sought 26 weeks' wages instead of the three months' wages awarded, by Notice of Appeal dated September 9, 2016.

2. These conjoined appeals raise the familiar but difficult challenge of identifying the proper demarcation line between reviewable errors of law which undermine the Tribunal's factual findings and grounds of appeal dressed up as legal challenges which in substance seek to undermine legally valid factual findings made by the Tribunal. The challenge comes into sharpest focus in cases where the parties are both legally represented because the Employment Act 2000 does not require the Tribunal Chair to be legally qualified.

3. Although there is a natural tendency for lawyers to attack Tribunal decisions on grounds that are more appropriate to challenges to decisions made by tribunals with legally qualified chairmen, this Court's appellate jurisdiction must respect the existing statutory scheme. Section 41(1) of the Employment Act 2000 ("the Act") limits the permissible grounds of appeal to points of law. As I have previously noted in *Raynor's Service Station-v-Earlston Bradshaw* [2016] SC (Bda) 60 App (3 June 2016):

> "*12… this Court's appellate jurisdiction in the present case is (in the absence of any other rules specifically governing appeals under the Employment Act) defined by Order 55* [rule 7] *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.*'"

4. In essence, an appellant seeking to challenge a decision made by the Tribunal under the Act must establish not only an error of law but also, further, that the error complained of has caused "*substantial wrong or miscarriage*". How well the statutory scheme of an entirely lay Tribunal serves the public is hard to tell. It is inevitable that decisions will not usually be expressed in legalistic terms and will not infrequently contain technical legal errors. The most important general legal requirement is that sufficient reasons should be given for Tribunal decisions so the parties and an appellate court can confirm that no substantial miscarriage of justice occurred. The Tribunal generally fulfils this basic function reasonably well. However, it may still be difficult for litigants and their legal advisers in cases such as the present to easily

assess when errors of law will or will likely not be viewed by this Court as sufficiently serious to vitiate an appealed decision.

The Tribunal's Decision

5. The Employer called three witnesses and the Employee herself testified in support of her complaint. The Employee was ostensibly summarily dismissed because the Employer accidentally deposited another worker's pay into her bank account while the Employee was on sick leave which she sent and then sought time to repay. The Employee did not acknowledge receiving the monies to which she was not entitled until after she was contacted by the Employer. The Employer believed that she was dishonest in denying that she was aware the monies were in her account. The Employee complained that the true reason for her dismissal was her complaints about mould at the Hotel and insisted that she had not been dishonest. The Tribunal reached the following conclusions:

(1) summary dismissal was only justified by section 25 of the Act where the ground of dismissal was (a) related to the employment relationship, and (b) has a detrimental effect on the employer's business;

(2) the Employee was dismissed for failing to disclose receipt of monies the Employer transferred to her account. In fact she was not guilty of dishonesty but only a lapse of judgment such that she contributed to her dismissal;

(3) the Employee's complaint that she was dismissed for environmental reasons was unmeritorious. The Employer was in fact concerned for her welfare (and that of other employees) and took the environmental concerns seriously. The complaint that she was dismissed because of her health problems was also rejected;

(4) the Employer's alternative case that summary dismissal was justified because the Employee took without permission a copy of an Environmental Report influenced the dismissal decision but did not support it;

(5) the grounds for the dismissal did not comply with section 25(b) of the Act because the misconduct relied upon did not to the requisite extent adversely affect the Employer's business;

(6) the Employee was awarded three months' wages in compensation taking into account, as required by section 40(4)(b) of the Act, "*the extent to which the employee caused or contributed to the dismissal*"

The Employer's Appeal

Grounds

6. The Employer appealed on the following grounds:

    (a) the Tribunal erred in law in not applying the elements of theft as particularised in section 359 of the Criminal Code. The Tribunal ought to have found that the Employee had committed theft and that summary dismissal was justified;

    (b) the Tribunal erred in law by finding that section 25(a) of the Act was not satisfied;

    (c) (a repetition of (a));

    (d) the Tribunal erred in law by granting a remedy under section 40 after rejecting the unfair dismissal complaint.

Adjudication

7. It is convenient to deal with grounds (b) and (d) first. The Tribunal's finding in relation to section 25(a) of the Act was at first blush unintelligible:

    "*17. The Tribunal contends that subsection (a) above was only applied after the Employee sought legal advice which she had a right to do. Prior to the acrimonious meeting of September 22, 2015, there was no hint of theft or serious misconduct…* "

8. However, the Employer's counsel, reading this finding in a generous way, properly understood it in the following way. The Tribunal found that the isolated incident which occurred was not sufficient to justify summary dismissal. This finding was said to constitute an error of law. In my judgment this ground of appeal is misconceived if it is detached completely from the first ground of appeal. Whether or not the grounds of the dismissal, which clearly related to the employment relationship, were, in the words of section 25, "*such that it would be unreasonable to expect the employer to continue the employment relationship*" is quintessentially a question of fact. And the relevant question for the Tribunal to decide was whether the Employer had grounds for summarily dismissing based on dishonesty and this question formed the subject of grounds of appeal (a) and (c).

9. Ground (d) was ultimately not seriously pursued. Ms Tucker rightly submitted that where a summary dismissal is not justified by the employer, there is a statutory presumption under section 38(2) that the dismissal was unfair, triggering an entitlement to remedies under section 40:

> "*(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.*"

10. It remains to consider the main remaining ground of appeal, the central complaint that the Tribunal erred in law by failing to find that the Employer was justified in dismissing the Employee summarily on the grounds of theft. Here, it is possible to view the Tribunal's findings as legally flawed because:

    (a) there is no express identification of the central legal and factual issue being whether or not the Employer has proved serious misconduct as required by section 25 of the Act;

    (b) there is no recitation of the legal principle that dishonest conduct is ordinarily considered to constitute grounds for summary dismissal;

    (c) on a very literal reading of the crucial finding, the Tribunal might be said to have wrongly found that it was not open to it find that theft had occurred:

        "*(i) The Employee cannot be found guilty of serious misconduct or theft in respect of the moneys erroneously placed in her account. The evidence in this regard is clear that, while perhaps guilty of a lapse of judgment, she immediately agreed that the overpayment of wages should be remedied, albeit on terms more favourable to her…*" [Emphasis added].

11. Mr Crockwell contended that section 359 of the Criminal Code ("*Dishonestly retaining a wrongful credit*") ought to have been applied by the Tribunal although it seems doubtful that this statutory provision was referred to before the Tribunal. An essential element of this offence, like the offence which the Tribunal relied upon (stealing or theft), is dishonesty. It was effectively common ground that if the Employer proved that the Employee had been dishonest then summary dismissal would have been justified. It is correct that the Tribunal found that the Employee ought to have noticed the deposits. It does not follow from this that she acted dishonestly. Indeed, this finding appears in part to underpin the holding that the

Employee contributed to her dismissal. And so however imperfectly expressed the Decision was in legal terms, there is no room for doubt that on a correct view of the law the Tribunal correctly identified the central issue as being whether or not the Employer was justified in concluding that the Employee had been guilty of dishonesty.

12. Mr Crockwell submitted, without dissent from his opponent, that the Tribunal was bound to follow the approach established in *Iceland Frozen Foods Ltd.-v-Jones* [1983] ICR 17. This required the Tribunal to adopt the following approach approved by the English Court of Appeal in *Foley-v-Post Office* [2001] 1 All ER 550 at 558 (Mummery LJ):

> "*52. It was also made clear in* Iceland Foods *at pp.24G-25B that the members of the tribunal must not simply consider whether they personally think that the dismissal is fair and they must not substitute their decision as to what was the right course to adopt for that of the employer. Their proper function is to determine whether the decision to dismiss the employee fell within the band of reasonable responses 'which a reasonable employer might have adopted'.*
>
> *53. In one sense it is true that, if the application of that approach leads the members of the tribunal to conclude that the dismissal was unfair, they are in effect substituting their judgment for that of the employer. But that process must always be conducted by reference to the objective standards of the hypothetical reasonable employer which are imported by the statutory references to 'reasonably or unreasonably' and not by reference to their own subjective views of what they would in fact have done as an employer in the same circumstances. In other words, although the members of the tribunal can substitute their <u>decision</u> for that of the employer, that decision must not be reached by a process of substituting <u>themselves</u> for the employer and forming an opinion of what they would have done had they been the employer, which they were not.*"

13. These principles do not reflect the Bermudian law position in relation to unfair dismissal because the Bermuda statutory definition is wholly different to that in the United Kingdom. The definition of unfair dismissal considered in *Iceland Frozen Foods Ltd.-v-Jones* [1983] ICR 17 required the tribunal to determine "*whether the dismissal was fair or unfair, having regard to the reason shown by the employer…whether in the circumstances…the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee*…" The primary definition of unfair dismissal under the Bermudian Act sets out certain prohibited reasons for dismissal and deems them unfair (section 28). The question when section 28 is invoked will simply be whether or not the dismissal was based on a reason prohibited by section 28(1).

14. The English principles relied upon by counsel do reflect, to some extent, the Bermudian law position relevant to the part of the Decision in issue on the present appeal. Because section 25 of the Act most importantly requires the Tribunal to decide, objectively, "*it would be unreasonable to expect the employer to continue the employment relationship*". This calls for an objective assessment of whether a reasonable employer would or would not have made the summary dismissal decision, assuming of course, that summary dismissal was justified because serious misconduct occurred. Because section 25 requires the employer to establish first and foremost that the employee "*is guilty of serious misconduct*".

15. That is a threshold issue which the Employer here had to establish in circumstances where it was implicitly agreed that it would be reasonable to summarily dismiss if dishonesty was proved. If the facts of this case are properly analysed, the case was disposed of against the Employer on this threshold issue without the need for the Tribunal to consider whether the dismissal fell within a reasonable range of responses. As a matter of law, it was not a lawful response in the absence of proof of serious misconduct. The reasonable range of responses issue only truly arises (in cases under section 25 at least) where it is unclear whether the misconduct established amounts to serious misconduct or not. In the present case argument centred on what conduct the Employee was guilty of, not whether, assuming the Employer's case of dishonesty was made out, summary dismissal fell within the range of reasonable responses.

16. The burden of proof was on the Employer to prove serious misconduct and the Tribunal resolved this factual issue against the Employer, after having heard and seen the Employee give oral evidence. Any error of law can only justify this Court's intervention if it has occasioned substantial injustice. Any error of law was wholly technical and reflected imperfections of expression. In substance the Tribunal in my judgment applied the correct legal test in all the circumstances of the present case and its crucial findings were <u>not</u> ones which no reasonable tribunal could have properly reached. It is clear that the Tribunal crucially found that, based on its view of the facts, there was no basis for finding that the Employee was guilty of theft. It is not a fair reading of the Decision to suggest that the Tribunal did not appreciate that, on one view of the evidence, it was indeed possible to find that the Employer was justified in finding that the Employee had acted dishonestly.

17. As I stated in the *Raynor's Service Station-v-Earlston Bradshaw* case:

"*8…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*."

18. The Employer's appeal is accordingly dismissed.

The Employee's Appeal

Grounds

19. The Employee refined the original six grounds of appeal in her Notice of Appeal into four grounds in her counsel's Skeleton Submissions. In the course of the hearing, Ms Tucker abandoned Ground 1, leaving Grounds 2 and 3 dealing with the contribution finding and Ground 4. The latter was a distinct point alleging an additional right to compensation for a breach of section 20(3) (b) of the Act by giving notice of termination while the Employee was on sick leave.

Adjudication

20. I saw nothing in the complaint that the Tribunal wrongly took into account the provisions of the Act (section 8(3)(a)) dealing with salary overpayments. This reference was, it seems to me, by way of analogy as the Decision makes it obvious that the Tribunal fully appreciated that the monies in question were monies intended for a third party employee, not overpayments of the Employee's actual salary.

21. The only point of law advanced in aid of the attack on the finding that the Employee contributed to the dismissal was the complaint that the extent of the contribution ought to have been spelt out in percentage terms. This was a valid criticism although it was conceded that to the extent that the maximum possible award was 26 weeks' pay (section 40(5) of the Act), an award of three months or 12 weeks represented roughly 50%. That the usual approach in a similar statutory context is for a tribunal to spell out the extent of contribution in percentage terms, identify the appropriate compensatory award and then apply the discount was illustrated by reference to the English case of *Montracon Ltd-v-Hardcastle* [2012] UKEAT 0307. Ms Tucker

referred to the following passage in the Employment Appeal Tribunal's judgment in an appeal from an Employment Tribunal:

> "*6. On the question of contribution the majority found, for the purposes s123(6) Employment Rights Act (compensatory award) the Claimant's conduct in forgetting the height of the trailer when approaching the bridge was clearly culpable and seriously culpable. The dismissal was to a large extent caused or contributed to by the Claimant's actions within s123(6). The majority assessed the level of the Claimant's contribution to his dismissal at 60 percent. The compensatory award fell to be reduced accordingly*…"

22. The Tribunal did err in law in failing to make an explicit determination of the extent of the Employee's contribution and the appropriate compensatory award before any discount was applied. Such an approach ought ordinarily to be adopted by the Tribunal, because this is the customary way in which findings of contributory fault are recorded by courts and quasi-judicial tribunals. It is not an express statutory requirement but is an implied one. Section 40(4) merely provides as follows:

> "*(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 in so far 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.*"

23. This obviously procedural rather than substantive rule may also be viewed as an incident of the rules of natural justice. A litigant cannot generally have a fair hearing without understanding with sufficient clarity the reasons for an adjudicator's decision. When making a compensation order and having regard to the extent to which an employee caused or contributed to the dismissal, the amount of compensation considered appropriate and the extent of the employee's contribution (if any) are important matters explaining the basis of the compensation decision.

24. Establishing the failure of the Tribunal to comply with this procedural rule and to sufficiently explain the basis for its compensatory award does not automatically compel this Court to find that substantial wrong flows from this procedural error. It is self-evident that the Tribunal has complied with the mandatory express requirements of section 40(4) of the Act by having regard to both the loss to the Employee caused by the Employer and the extent to which the Employee contributed to her dismissal.

The Decision makes a compensatory award, finds that the Employee did not act dishonestly, and also expressly takes into account:

> (a) the fact that the Employer's mistake created the circumstances which gave rise to the Employee's misconduct; and
>
> (b) the fact that the Employee ought to have identified the fact that monies had mistakenly been credited to her account and immediately contacted the Employer.

25. It is possible to infer from the decision that the Tribunal found that the Employee was at least roughly 50% to blame assuming a maximum award would otherwise have been made in her favour. A maximum award is the most favourable assumption to make in the Employee's favour. Having regard to the evidence before the Tribunal and the facts which were found by it, it is impossible for this Court to fairly find that the crucial factual findings are so perverse and/or unsupportable that a substantial wrong or miscarriage of justice has occurred. I would accordingly dismiss the Employee's main ground of appeal and leave the compensatory award of the Tribunal undisturbed.

26. Did the Tribunal err in law in not making a separate award for a breach by the Employer of section 20(3)(b)? This section provides as follows:

> "(3)*A notice of termination shall not be given by an employer during an employee's absence—*
>
> *(a) on annual vacation, maternity leave or bereavement leave;*
> *(b) on sick leave, unless the period of sick leave extends beyond four weeks.*" [Emphasis added]

27. The Tribunal found that the Employee left the Hotel due to an asthma attack on September 3, 2015 and never returned. She was certified sick until the third week of September. Whilst she was still on sick leave, on September 18, 2015, the Hotel notified her of the mistaken deposits. On September 24, 2015 she was told not to return to the office. This was apparently after the Employee's certified sick leave had come to an end. Her termination letter was dated October 15, 2015.

28. Based on the factual findings reached by the Tribunal on this issue, no error of law occurred and section 20(3)(b) was not even engaged. The Employee's counsel did not demonstrate these findings were not available to the Tribunal to reach so that they could be set aside by this Court as an error of law. This issue does not appear to have been a significant one before the Tribunal. It seems improbable, even if it was overlooked or misconstrued, that a breach of section 20(3)(b) would have affected the final compensatory result. This ground of appeal also fails.

29. The Employee's appeal is accordingly dismissed.

Summary

30. The Employer's appeal and the Employee's appeal is each dismissed. Both sides identified technical errors of law. But, on careful analysis, these errors did not undermine the substantive validity of the Decision.

31. Unless either party applies by letter to the Registrar within 21 days to be heard as to costs, no Order shall be made as to the costs of the appeal.

Dated this 18th day of November, 2016 _____

IAN RC KAWALEY CJ