In The Supreme Court of Bermuda

APPELLATE JURISDICTION

CONSOLIDATED APPEALS

NO. 4 OF 2020
NO. 5 OF 2020

BETWEEN:

BERMUDA BISTRO AT THE BEACH

APPELLANT

v

(1) JEREMY PARIS

(2) JENNIFER LYNCH

RESPONDENTS

Before: **Hon. Jeffrey Elkinson, Assistant Justice**

Appearances: **Mr. Mark Pettingill JP, Chancery Legal Ltd., for the Appellant**

Mr. Vaughan Caines, Forensica Legal Ltd., for the Respondents

Date of Hearing **13 September 2021**

Date of Judgment **17 September 2021**

JUDGMENT

LEGISLATIVE BACKGROUND

1. The Employment Act 2000 ("the Act") was passed with the intent to promote fair treatment of employers and employees by providing minimum standards of employment, establishing procedures in relation to termination of employment and setting out relevant notice periods. Employees are given protection against unfair dismissal and the Employment Tribunal, more recently amended to be the Employment and Labour Relations Tribunal[1] was established where matters of termination of employment would be heard.

THE APPEALS

2. The Appeals before the court relate to two hearings before the Tribunal which took place on 28th June 2019 and 6th September 2019 in respect to the termination of employment of Mr. Jeremy Paris and Miss Jennifer Lynch. In Mr. Paris' case, his complaint related to unfair dismissal and Miss Lynch's complaint was based on constructive dismissal. The Determinations in both, given that both were based on facts common to each of them, were delivered on 19th December 2019.

3. The Employment Act 2000, prior to amendment, under which the two complaints were heard, provided at Section 41 that a party aggrieved by a Determination or Order of the Tribunal may appeal to this court on a point of law.

4. The Employment Act (Appeals) Rules 2014 sets out the procedure for bringing an appeal. The Appellant, being dissatisfied with the Determinations rendered by the Tribunal in relation to both former employees, appealed with the main basis being that the Tribunal failed in law to properly consider and weigh the evidence.

5. As regards the Record from the Tribunal in relation to both matters, the only documentation provided to the court was the decision of the Tribunal in both matters and an Affidavit of Mr. Rick Olson sworn on 24th June 2019.

6. In the context of an Appeal which sought to overturn the decision of the Tribunal on the basis that the decision was contrary to the evidence and so gave rise to an appeal on a point of law, the lack of a substantive Record of what transpired at those hearings presented a challenge to counsel for the Appellant. He sought to overcome this by a detailed examination of the Determinations handed down by the Tribunal with reference to the Affidavit of Mr. Olson and what he deposed to. Mr. Olson, whilst he provided an Affidavit which was deployed in the Tribunal hearings relating to both Mr. Paris and Miss Lynch, did not appear in the Tribunal hearing of Mr. Paris to be cross-examined.

7. As regards the Appeal against the decision to award Mr. Paris a compensation order representing 26 weeks wages in the amount of $36,400, the Tribunal determined that Mr. Paris's claim for

[1] Established under Part V A of the Act as amended and effective as of the 1st June 2021

unfair dismissal was justified and that the employer had failed to present evidence which would support the dismissal for serious misconduct, the burden of proof being his as provided for by Section 25 of the Act.

8. Mr. Pettingill on behalf of the Appellant took the court through the Determinations of the Tribunal and cross-referenced the paragraphs setting out their reasons with the contents of Mr. Olson's Affidavit. Mr. Pettingill's submissions were that Mr. Olson had provided evidence that Mr. Paris had resigned from his employment at the Bermuda Bistro at the Beach as of 27th February 2018. On that date, he wrote to Mr. Olson as the owner and president of Bermuda Bistro at the Beach to inform him that he was resigning as Manager with effect from 13th March 2018. The submissions made to the court were that by giving this letter of resignation on 27th February 2018, and despite the fact that it stated it would only be with effect from 13th March 2018, Mr. Paris had effectively terminated the employer/employee relationship and that this was deposed to in Mr. Olson's Affidavit. Mr. Olson said that he accepted the resignation and in that Affidavit he sets out that he named a new temporary General Manager, who was an existing employee, and expanded another existing employee's role. He said that a few weeks after resigning both Mr. Paris and Miss Lynch asked for their jobs back as they had changed their minds in investing in another business, that of the Red Steakhouse, owned by his son.

9. Mr. Olson's Affidavit goes on to set out a series of conversations that he had with Mr. Paris and Miss Lynch, not least in respect to not renewing work permits, that he felt that there was a trust and loyalty issue and that in any event he was not happy that given Mr. Paris and Miss Lynch were in a relationship that they would be working together for him. He further set out complaints about Mr. Paris creating false and malicious accusations about Mr. Olson in connection with racism and Mr. Olson concludes his Affidavit with stating that in order to settle any issues with Mr. Paris' employment, he offered to pay Mr. Paris the sum of $12,500 as full and final settlement of their employment relationship, which Mr. Paris accepted.

10. In the context of what is set out in the Affidavit, it would appear from the Determinations of the Tribunal that none of Mr. Olson's evidence was accepted by them.

11. The only evidence before this court of the evidence of the employee which was given to the Tribunal is what is set out in the Determination. For example, at paragraph 14 of the Determination in relation to Mr. Paris it is stated *"The Employee was vehement in countering the false argument that he made malicious comments about the Employer which damaged the business establishment."*

12. The employee also gave evidence that whilst he and Miss Lynch had given notice of their intention to resign in order to pursue the business opportunity at Red Steakhouse, which did not materialize, the employer had in any event come to their home and requested that they reconsider

their resignation. To support that position, pay statements were provided to the Tribunal which showed continuous employment beyond the stated date that the resignation was due to take effect.

13. The Appellant complains that the Tribunal failed to understand the test as regards the burden of proof on the employer to prove that the termination was justified. In particular, the Appellant focused on the language used by the Tribunal in their Determination in respect of false and malicious accusations made by the employee, where it stated that there was no evidence of this being presented to the Tribunal. The Appellant submitted that this was clearly stated by Mr. Olson in his Affidavit and pointed to paragraph 12 as proof of this. It was submitted that the approach of the Tribunal was clearly wrong in law and entirely unfair to the employer for the Tribunal to ignore Mr. Olson's sworn evidence.

14. This submission was also made in respect of the payment of $12,500 which the Tribunal did not accept as being in full and final settlement of any claims that Mr. Paris had against Bermuda Bistro at the Beach. Mr. Olson had said in his Affidavit that it was.

15. As regards Mr. Paris' case before the Tribunal, I am satisfied that on a reading of the Determination it is clear that little if any weight was given to the evidence of Mr. Olson and that the Tribunal accepted the evidence of Mr. Paris. Whilst the Appellant may complain that the Tribunal did not have any legal guidance and that none of the members of the Tribunal were lawyers, the court is satisfied that the Determinations and final Orders of the Tribunal in both Mr. Paris's case and Miss Lynch's case, which will be considered further in their Judgment, were cogent and establish that the Tribunal considered the evidence presented by the parties. The Tribunal was clear in finding that the employer failed to establish any justification for the dismissal of Mr. Paris.

16. It is not sufficient for an Appellant to say that there was evidence in the form of an Affidavit and expect that this fact alone should carry the day. The Affidavit evidence of Mr. Olson did not trump the evidence of the employee given orally and which was subject to cross-examination by counsel and where the credibility and reliability of the witness could be judged by the Tribunal. It is clear to the court that Mr. Paris' evidence and to a large extent that of Miss Lynch, whilst not expressly stated by the Tribunal, was accepted by the Tribunal as representing the truth of what occurred in the employer/employee relationship leading up to the terminations.

17. An alternative way of summarizing the Tribunal's Determination is to state that the Tribunal was unpersuaded by Mr. Olson's evidence such that he failed to discharge the burden of proof required to show that the termination was justified. As regards that burden of proof, it would be on the balance of probabilities and there is nothing in the Determination of the Tribunal which would lead this court to believe that the Tribunal had improperly considered that the burden of proof was beyond reasonable doubt, the criminal standard.

18. The court is satisfied that the Tribunal properly conducted itself and did indeed take account of what Mr. Olson said in his Affidavit but, as noted by them in respect of the issue concerning the false and malicious accusations, they gave no weight to the Affidavit evidence provided by Mr. Olson. As counsel for the Respondents pointed out, there was no corroboration from any other witness, no contemporaneous documentation showing that this took place and most telling, as Mr. Caines for the Respondents submitted, was the fact that if this behaviour was in any way part of the justification for summary dismissal, why did Mr. Olson pay Mr. Paris $12,500 on the termination?

19. I am satisfied that there is no basis to overturn the Determination of the Employment Tribunal and as regards Mr. Paris, the appeal is dismissed.

20. As regards Miss Lynch, the hearing took place on 6th September 2019, again with the same counsel representing the parties. Miss Lynch's case was one of constructive dismissal where the burden of proof lies with the employee to prove this.

21. The same issue concerning resignation arose and in its deliberation the Tribunal at paragraph 28 of its Determination used the expression that it *"... struggled to locate the evidence that the employer accepted the employee's resignation which was to take effect on 13th March 2018."*

22. Counsel for the Appellant picked up on this expression and pointed out that Mr. Olson's Affidavit, as sworn on 24th June 2018 and which was before the Tribunal, recited at paragraph 3 that he had accepted their resignation.

23. However, the Tribunal as they had done some four months earlier in Mr. Paris' hearing, did not accept Mr. Olson's evidence and whilst the Tribunal may have chosen other words which would clarify that they did not accept Mr. Olson's evidence in respect of his acceptance of resignation, I do not accept that the words they did use can justify the submission that the Tribunal totally overlooked the fact that there was evidence of acceptance of the employee's resignation. The Tribunal clearly were focusing on evidence which was compelling and which satisfied the burden of proof, namely that on the balance of probabilities the employees' resignation was not accepted. As they themselves go on to say in their Determination, having said that *"There is equally no evidence presented that proved that the Employee was offered and operated under a separate and distinct contract of employment*" they state, *"To the contrary, the evidence is that there was no break in service. This can be deduced from the itemised pay statements that were issued in accordance with Section 6 of the 2000 Act."* The Tribunal then went on to say that it was not difficult for them to conclude that the employee had enjoyed unbroken service with the Company until she resigned in January 2019 when she gave formal resignation effective immediately, reciting issues which had arisen over the previous eight months whereby she considered she had been constructively dismissed.

24. The Tribunal accepted the employee's evidence that she was working in an *"unbearably toxic environment"* created by the employer and which gave rise to a justifiable claim for constructive dismissal. She was awarded the sum of $20,000.

CONCLUSION

25. I find that based on the limited record put before the court there is no basis to disturb the Determinations and Orders of the Tribunal. Mr. Caines on behalf of the Respondents cited the case of **Andrew Robinson v Commissioner of Police [1995] Bda L.R. 64**, a judgment of Mr. Justice Ground in respect of an appeal from the Magistrates' Court where he said, *"It is, of course, a cardinal rule that the trial court is the best court to judge the credibility or reliability of witnesses, and the appellate court, even when conducting a rehearing, should not interfere with the trial judge's findings in that respect unless it appears that 'he has not taken proper advantage of his having seen and heard the witnesses.' That may be apparent because the reasons given by the judge are not satisfactory, or because it unmistakably so appears from the evidence: per* ***Lord Thankerton in Watt or Thomas v Thomas [1947] AC at p. 48****."*

26. Whilst the Employment Tribunal is not a court of law, equally it is not for the Supreme Court on hearing appeals from the Employment Tribunal to interfere with Determinations where the Tribunal has heard the evidence and seen the witnesses, unless from the evidence that is presented to this court it appears that no reasonable Tribunal, having heard the evidence and seen the witnesses, could have possibly come to the conclusion that they did. That is certainly not the case here. I am satisfied that the Employment Tribunal reached the correct decisions in both matters which were before them and that there was no error of law which justifies an appeal, let alone a successful one, in either matter.

27. Having regard to the dismissal of both appeals, the normal order would be that the Respondents should have their costs, to be taxed if not agreed, unless counsel wishes to apply within seven days of the date of delivery of this Judgment for a different Order to be made.

Dated this 17h day of September 2021

JEFFREY ELKINSON
ASSISTANT JUSTICE