The Court of Appeal for Bermuda

CIVIL APPEAL No. 12 of 2016

B E T W E E N:

RAYNOR'S SERVICE STATION

Appellant

-v-

EARLSTON BRADSHAW

Respondent

Before: **Baker, President**
Clarke, JA
Hellman, JA

Appearances: Ms LeYoni Junos, as McKenzie Friend for the Appellant
G Rick Woolridge, Phoenix Law Chambers, for the Respondent

Date of Hearing: **5 June 2017**
Date of Judgment: **16 June 2017**

JUDGMENT
(In Court)

BAKER, P

1. This appeal is all about a $50 bill. The Respondent, Mr Bradshaw, ("the employee") worked for the Appellant, Raynor's Service Station. A customer dropped a $50 bill. The employee found it and put it in his pocket, but a few minutes later handed it to the customer. The Appellant says he was guilty of theft because when he put it in his pocket he intended to keep it and, after looking into the matter, dismissed him for serious misconduct.

2. The employee went to an employment tribunal claiming unfair dismissal. The Tribunal agreed and awarded him compensation. It said: "the evidence is not persuasive that the employee deliberately intended to deprive the customer of his property."

3. The Appellant appealed to the Supreme Court. The Chief Justice heard the appeal but dismissed it. The Appellant now appeals to us claiming that both the Tribunal and the Chief Justice made errors of law.

The Legislation.

4. Section 25 of the Employment Act 2000 is headed: "Summary dismissal for serious misconduct." It provides:

> *"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."*

Thus in order for an employer to dismiss an employee without notice two conditions must be satisfied. First the employee must be guilty of serious misconduct and second it must be such that it would be unreasonable to expect the employer to continue to employ him.

5. Section 28 is headed: "Hearing of complaints by Tribunal." Subsection (2) provides:

> *"(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."*

So the employer had to establish the two factors in section 25, in particular that the employee was guilty of serious misconduct, otherwise the dismissal is presumed unfair. In short, the issue was whether the employee stole the $50 bill.

6. The appeal to the Chief Justice was not a rehearing. Section 41(1) provides that a party aggrieved may appeal to the Supreme Court on a point of law. Likewise an appeal to the Court of Appeal is on a point of law. Accordingly the question is whether the Chief Justice made an error of law in concluding that the Tribunal did not err in law.

7. Ms Junos appeared before us as a McKenzie Friend for Mr Raynor on behalf of the Appellant. She did not appear before the Chief Justice. She argued the appeal with very considerable skill. Wisely, she abandoned the first ground of appeal that the Tribunal was not properly constituted.

8. The first ground argued by Ms Junos was that the Tribunal applied the wrong test. She submitted the question was not whether the employee was guilty of serious misconduct i.e. theft, as the literal words of section 35(2) suggest, but whether the Appellant entertained a reasonable suspicion amounting to belief that he had stolen the $50 bill. This is known as the "*Burchell*" test. See *British Home Stores v Burchell* [1978] IRLR 379. Arnold J, as he then was, put it this way at page 2:

> *"What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think,*

> *that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."*

9. The *Burchell* test has remained the correct approach in the United Kingdom to this day, see for example *Stuart* v *London City Airport Limited* [2013] EWCA Civ 973. The crucial point is, however, that the legislation governing appeals to a tribunal in employment cases is different in Bermuda from that in the United Kingdom. *Burchell* was decided on para 6 and 8 of Schedule 1 to the Trade Union and Labour Relations Act 1974. Para 6(1), which has subsequently been re-enacted in similar form (see section 98 of the Employment Protection Act 1996), provided that: "In determining for the purposes of this Schedule whether the dismissal of an employee was fair or unfair, it shall be for the employer to show—." There then follow the reasons that must be shown. Para 8 then provides:

> *"Subject to sub-paragraphs (4) to (7) above, the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether the employer can satisfy the tribunal that in the circumstances (having regard to equity and the substantial merits of the case) he acted reasonably in treating it as a sufficient reason for dismissing the employee."*

10. It was not suggested before the Chief Justice that the *Burchell* test applied and the appeal before him proceeded on the basis that it was for the Tribunal to decide whether it was satisfied that the employee was guilty of theft. Ms Junos did not produce any authority to support her contention that the *Burchell* test applied to the Bermuda legislation. There are, however two authorities that have some bearing on the issue. In *Matthews v Bank of Bermuda Limited* [2010] SC 48 Civ (20 August 2010) the Chief Justice was faced with contrary submissions about the meaning of section 25. Mr Horseman submitted that the requirements for summary dismissal under

section 25 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. The Chief Justice did not entirely accept either submission. He said this at para 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 to 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 this 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 employee relationship" in my judgment brings into play the further consideration whether summary dismissal would be a "reasonable" penalty within the principles set out in section 24".*

He then recited section 24(1) which says that an employer can take disciplinary action including a written warning or suspension when it is reasonable in all the circumstances to do so and section 24(3), the factors to be taken into account.

11. Whilst concluding that section 25 should not be read in isolation but in conjunction with section 24, he did not go so far as to say that section 25 should be read as importing the Burchell test rather than as giving the words

their ordinary meaning. There is, nevertheless, an apparent inconsistency between sections 24 and 25. Section 25 requires proof of guilt of the serious misconduct. Where misconduct short of serious misconduct is alleged, the test is reasonableness and, if the relevant criteria are established, disciplinary action can be imposed including, one assumes, dismissal. The focal point under section 24 is the moment the employer takes the decision on the facts then known to him. The focal point under section 25 is when the Tribunal makes its decision on the evidence before it. Suppose there are two employees and the employer has evidence that they are both engaged in misconduct; one of misconduct and the other serious misconduct. Both are dismissed, the latter summarily but evidence later comes to light that neither was guilty of misconduct. If both complain to a tribunal, the employer would be able to prove the dismissal of the former was fair but not the latter.

12. In my judgment the draughtsman had plainly in mind that serious misconduct which is often, but not invariably, theft is likely to warrant the most serious sanction of summary dismissal. Thus it was necessary to establish as the first gateway through which the employer must pass that the conduct had actually occurred rather than that he reasonably thought that it had occurred. This seems to me to be entirely consistent with the subsequent requirement in the latter part of section 25 then to consider reasonableness as described by the Chief Justice in *Matthews*. I note also what the Chief Justice said in *Elbow Beach Hotel Bermuda v Lynam* [2016] Bda LR 112 at para 14:

> *"----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 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"".*

Despite Ms Junos valiant efforts, I am unpersuaded that the *Burchell* test is applicable to section 25 of the Employment Act 2000.

13. The Appellant appealed to the Supreme Court on three grounds. These were:

(a) "That the said Tribunal erred in law when it found that "even if the employee intended to deprive the customer of his property, the action of temporarily placing the $50 bill in one of his pockets cannot rise to the level of theft as it was returned within the shortest possible window of time taking into account that the employee was conducting other company business at the same time"

(b) "That the said tribunal erred in law in finding that "*the returning 'lost and found' property, is more of a moral issue, and therefore places very little weight on the employer's argument that the employee violated the unwritten policy"";* and

(c) "That the said order was against the weight of the evidence".

The Chief Justice elided the first two grounds into the Tribunal misdirecting itself as to the legal requirements of theft in relation to the facts of the case.

14. The structure of the Tribunal's decision was that following a brief background description they summarised first the case for the employer, recording the sequence of events as presented by the employer, then the case for the employee, then their deliberation and finally their conclusion. In the deliberation section they began by stating what they regarded as the issue:

> *"The challenge for the Tribunal is to determine whether there was a deliberate intention on the part of the employee to deprive the customer of his property – accepted by all parties as a $50 bill."*

15. The determination of the Tribunal was expressed in three paragraphs, the first of which was an answer to the above:

> *"The evidence is not persuasive that the employee deliberately intended to deprive the customer of his property."*

The second and third paragraphs of the determination were that the employer did not consider other disciplinary options and that the dismissal for serious misconduct was unfair.

16. One of the paragraphs of the Tribunal's deliberation of which complaint is made is:

> *"The Tribunal cannot ignore that even if the employee intended to deprive the customer of his property, the action of temporarily placing the $50 bill in one of his pockets, cannot rise to the level of theft as it was returned within the shortest possible window of time – taking into account that the employee was conducting other company business at the same time."*

The Chief Justice accepted that on a narrow reading of the words used this amounted to an error of law because it ignored the doctrine of theft by finding because theft can indeed be committed in circumstances of a temporary taking where the thief has a change of heart when confronted with his crime. But, he said, this would not be a fair way to characterise the relevant finding in the context of the decision and the proceedings as a whole. He said that he would interpret the finding as:

> *"In all the circumstances of the present case, what the Tribunal finds the Respondent did does not amount to theft."*

He went on that what was most significantly in dispute before the tribunal was not what comprised the legal elements of theft but whether or not the employee had been acting dishonestly, which was a question of fact.

17. Ms Junos makes the point that there is no mention by the Tribunal from first to last of dishonesty and that it is an essential element of theft. Further, the description by the Tribunal of the challenge to it and its first determination not only make no mention of dishonesty but also refer to depriving the customer of his $50 bill, leaving it unclear whether it needs to be permanent deprivation – another essential element of theft. This, she submits, is important, particularly in light of the Tribunal's earlier observation that temporary placement of the bill in his pocket cannot rise to the level of theft as it was shortly returned. There were two possibilities. Either the employee pocketed the $50 bill intending to keep it or he did so temporarily whilst dealing with another customer without any dishonest intent. The Tribunal made no finding on this, although the reference to "conducting other company business at the same time" suggests they felt the latter was more likely. But, submits Ms Junos, the Tribunal could well have been under the mistaken impression that it was not theft if the Respondent dishonestly intended to keep the $50 bill when he put it in his pocket but quickly changed his mind and gave it back to the customer.

18. This point is fortified by what was the Appellant's second ground of appeal to the Supreme Court which was not specifically dealt with by the Chief Justice but merged in the first ground. This ground was based on the last para of the Tribunal's deliberation section which was as follows:

> *"In conclusion and for the purpose of this case, the Tribunal views the returning 'lost and found property,' is more of a moral issue and therefore, places very little weight on the employer's argument that the employee violated the unwritten policy."*

Whilst this reference to returning lost property being a moral issue is open to the same inference that the Tribunal was mistaken as to the law of theft, one

must not lose sight of the fact that it was an issue before the Tribunal whether the Respondent was aware of and had violated company policy in failing to hand the $50 bill to the cashier.

19. The Tribunal's expressed deliberation and determination were less clearly expressed than they could have been. There was a marked absence of findings of fact to which I shall come when dealing with the final ground of appeal. However, I have firmly in mind the words of the Chief Justice in *Elbow Beach* at para 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 access when errors of law will or will likely not be viewed by this Court as sufficiently serious to vitiate an appealed decision."*

20. I entirely agree that some latitude is required in reviewing the manner in which the Tribunal, comprised as it was of laymen and not lawyers, has expressed its reasoning and conclusions. I note, in particular the Tribunal's statement that the legal precedents presented by counsel on behalf of the employee were "overwhelmingly persuasive and not robustly challenged". In these circumstances it seems clear that the elements of theft relevant to the present case were in the forefront of the Tribunal's mind. It seems clear to me therefore that in reaching its decision the tribunal had focussed on whether the employee had acted dishonestly although they did not expressly say so. It

is notable that in reaching its conclusion the Tribunal took into account the employee's good character and work record, the fact that he was transacting business with the cashier relating to other customers when he put the $50 bill in his pocket and that within less than two minutes he handed the $50 bill to the customer. These are all matters that went to the issue of honesty or dishonesty.

21. Were it not for my conclusions on the final ground to which I now turn I would have upheld the decision of the Chief Justice and dismissed the appeal.

22. The third ground of appeal to the Chief Justice was that the decision was against the weight of the evidence. He dealt with it in this way in para 8 of his judgment:

> *"Having reviewed the Record and viewed video footage, it is impossible for this Court to fairly conclude that the central finding that a reasonable employer should have given the respondent the benefit of the doubt is against the weight of the evidence. This was a finding it was open to the Tribunal to reach, having heard and viewed the evidence, including (most significantly) the cross-examination of the Respondent. It is easy to see why the Appellant is disappointed with having its view of the facts rejected. The Respondent's conduct was, in the absence of any reasonable explanation, quite clearly capable of being construed as amounting to theft. However, his explanation, combined with previous good character, was hardly one which should have been 'laughed out of court'. It is unsurprising, based on the way Mr Woolridge advanced the Respondent's case before this Court, that the tribunal reached the conclusion that it did."*

He then made the point that where a trier of facts sees and hears the witnesses and rejects an allegation of dishonesty, an appellate tribunal is in no position to reverse the primary findings reached by the fact-finding tribunal. See *Mutual Holdings (Bermuda) Ltd v Diane Hendricks et al* [2013] UKPC 13, a case with which I am well familiar. However, for the reasons explained below, the

issue is not whether this Court should substitute its decision for that of the Tribunal, but whether the matter should be re-heard by a different tribunal.

23. The Tribunal and the Chief Justice viewed video footage taken on the date of the incident. The Tribunal did not have a transcript of what was said on that footage but the Chief Justice did and we too have seen the video and the transcript. It was difficult to follow what was said without the transcript. Like the Chief Justice, we have had access to the administrator's typed notes made during the Tribunal proceedings.

24. Bearing in mind that only an appeal on a point of law is allowed, an appellate court inevitably views with some scepticism a ground of appeal alleging that the decision was "against the weight of the evidence". Lord Donaldson MR had this to say in *British Telecommunications PLC v Sheridan* [1990] IRLR 27:

> *"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 particular finding of fact has always been regarded as a pure question of law. It can also interfere if the decision is perverse…"*

That was an appeal from an Employment Tribunal in the United kingdom but it is equally applicable to an Employment Tribunal in Bermuda as the Chief Justice made clear in *Matthews* at para 28.

25. We have examined carefully the video, the transcript of it and also the administrator's notes of the hearing to see how the Tribunal's findings matched the evidence before it. The Tribunal recorded at (v) under the "Sequence, as presented to the Tribunal by the employer" that the employee asked the customer if he had dropped or lost anything to which the customer replied that he would check his pockets. The employee was then seen placing

the $50 bill in his pocket and indicating that he was "coming right back". In the section headed: "the Case of the Employee" the Tribunal records: "Counsel would ask the Tribunal to review very carefully the video footage where it is clear that the employee asks the customer nearby if he had lost anything upon which the customer reacts by searching his pockets." The customer, Mr Raynor's, evidence as recorded in the administrator's notes is different. He realised he had dropped a $50 bill on the floor and asked the Appellant if he had picked it up, to which the employee replied "no". This was about a minute and a half after he had dropped it. In cross-examination it was put to the customer that it was the employee who asked the first question: "if anyone dropped $50". The video is noted in the administrator's notes as having been admitted in evidence and showing the employee picking up something off the floor in his right hand then putting it in his pocket after having a brief conversation with the customer. The Tribunal did not have the advantage of a transcript of what was said during the video recording. It records that some 14 seconds after the employee is seen picking something up off the floor and after a brief exchange between the employee and the cashier about other money the customer said to the employee: "[Was] that mine? To which the employee replied: "No".

Conclusion

26. I am driven to the conclusion (a) that the Tribunal was in error in proceeding on the basis that it was the employee rather than the customer who first raised the subject of the dropped $50 bill and (b) that item (v) of the sequence reworded by the Tribunal as presented by the employer states the case incorrectly. The case presented by the employer was that it was the customer who first raised the subject and the transcript of the video recording corroborates the customer's evidence adduced by the employer that that was so.

27. In my judgment it is a matter of critical importance what the first words were between the customer and the Respondent. If the Respondent, having just found a $50 bill on the floor asks a customer if he has lost or dropped

anything that is a strong pointer against a dishonest intention to keep it. If, on the other hand, the customer, having lost or dropped $50 asks the employee if he has picked it up and the employee denies it, it might be regarded as a pointer in the opposite direction.

28. The Chief Justice in the introductory section of his judgment said that it was common ground that the employee initially denied finding the money when first approached by the customer. This was correct and indeed there was a concession as to this by Mr Woolridge on behalf of the employee during the course of the appeal. He asked the Chief Justice for a brief adjournment so that he could review the video footage and then conceded that the customer had asked the employee about the $50 (see page 23 of the transcript). It had earlier been said by the Chief Justice during submissions (see page 4 of the transcript) that the basic facts seemed to be agreed. However, at no point did he refer to the Tribunal's incorrect recording of the Appellant's case that it was the employee who asked the customer if he had lost or dropped anything.

29. Mr Froomkin, who represented the Appellant before the Chief Justice, did make the point to him that the Tribunal had misstated the evidence on this critical point and indeed went on to point out that the subsequent recording of the customer saying: "I just had one right here" and the employee's responses: "whatchya playin' whatchya playin'?" and "you aint put nothing on the floor" were all of a piece with this. The Chief Justice in his judgment made no mention of the Tribunal's error, saying the Tribunal's finding was open to it having heard and viewed the evidence and, most significantly, the cross-examination of the employee.

30. Had the Tribunal appreciated that they were wrong in understanding that it was both sides' case that it was the employee who asked the customer whether he had lost or dropped anything, they may well have taken a different view of the correctness of his account to Mr Raynor a few days later and indeed of his evidence to the Tribunal.

31. The Tribunal was in error in assuming a critical fact was the opposite to what was in truth the case, as was indeed conceded by Mr Woolridge before the Chief Justice. This was, in my judgment, a fundamental error and they could well have reached a different conclusion had they not made it. The Tribunal took into account in the employee's favour his previous good character, long service and work performance, that he was transacting business relating to other customers with the cashier at the time and that the money was handed back within less than two minutes. These were all important matters in deciding whether he had acted dishonestly, but in my judgment they cannot trump the Tribunal's critical error which I am satisfied amounted to an error of law. It is not just a matter of the weight to be attached to the evidence; a critical piece of evidence was not taken into account at all.

32. The Chief Justice referred to Order 55(7) of the Rules of the Supreme Court which provides:

> *"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."*

In my judgment the Appellant has a justified grievance amounting to substantial wrong that his case was not properly considered by the Tribunal. This is not, however, a case in which it would be appropriate for this Court to substitute its own decision for that of the Tribunal, for it is not possible to say what conclusion the Tribunal would have reached had they not made the critical error. Had they found the Respondent guilty of serious misconduct they would have had to go on to consider whether it was unreasonable to expect the Appellant to continue the employment relationship.

33. With some reluctance, because of the time that has passed and the disproportionate amount of costs that are being incurred, I would allow the appeal and remit the case for re-hearing before a differently constituted Tribunal.

Signed

Baker P

Signed

Clarke JA

Signed

Hellman AJA