

BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Magisterial Appeal No.4 of 1999

BETWEEN:

EUDESE RAMSAY

(Appellant)

AND

ST. JAMES BEACH HOTELS SERVICES LIMITED

(Respondent)

Before: The Hon. Sir David Simmons K.A., B.C.H., Chief Justice, the Hon. Errol Chase, Justice of Appeal, and the Hon. Colin Williams, Justice of Appeal

2002: April 4 and June 26

Mr. Maurice King Q.C. and Mr. Adrian King for the Appellant

Mr. Andrew Thornhill and Mr. Gregory Nicholls for the Respondent

JUDGMENT

SIMMONS CJ: This is an appeal by the appellant from a decision of the Magistrate of District "E" (Holetown), in which, contrary to the appellant's claim, the Magistrate found that she had been lawfully dismissed by her employer, the respondent on March 19, 1997.

[2] The appellant's summary dismissal arose out of a workplace altercation involving an exchange of words between the appellant, a hotel maid at Coconut Creek Hotel and the respondent's housekeeper, Ms. Desce. On the morning of March 7, 1997, the appellant went to the housekeeper's office and asked her for her pay slip. Ms. Desce handed it to her and she looked at it. Her name was incorrectly spelt and she told Ms. Desce so. It was not the first time that her name had been incorrectly spelt. The appellant then asked Ms. Desce for an amenity bag and a garbage bag.

[3] The Magistrate found that an exchange of words, characterized by him as "a threat coupled with an obscenity" then followed. The appellant told Ms. Desce "I going beat you bad as cunt!" Thereupon, she left the office and Ms. Desce followed her out enquiring "You say [1] you going beat me bad as cunt?" The exchange was heard by Annette Moore.

The appellant denied using the words and suggested that they had been fabricated by Ms. Desce.

[4] The evidence disclosed that on March 7, 1997, the Manager of the hotel (Mr. Smith) suspended the appellant for 5 days and she returned to work on March 12. According to the evidence in chief of the appellant:

"Mr. Smith said he investigate and he ain't find no evidence against me and I continued with the work."

There was a meeting between management of the hotel and the appellant's Union representatives on March 14, 1997, "to investigate the charge of Eudese Ramsay using threatening remarks and obscene language to her supervisor." By letter dated March 21, 1997, the appellant was dismissed "effective March 19, 1997". No reason for the summary dismissal was given in the letter.

[5] In his very careful reasons for decision, the Magistrate asked himself two questions. First, did the appellant use the words? Secondly, if she did, was the conduct such as to warrant summary dismissal? He answered the questions by finding on a balance of probabilities that the appellant had used the words and that "such an exhibition of behaviour to the supervisor (housekeeper) demonstrates conduct which the Court found to be incompatible with the continuation of the working relationship.....It struck at the root of the employer/employee relationship."

[6] The Magistrate concluded his reasons for decision in these terms:

“On an evaluation of all the evidence, the Court was of the view that the Plaintiff’s (appellant’s) behaviour amounted to misconduct incompatible with the relationship of employer and employee. In the circumstances, the Court found that the summary dismissal of the Plaintiff for threatening a supervisor and using obscene language was justified.”

He dismissed her claim for damages for wrongful dismissal.

[7] On appeal Mr. Maurice King Q.C. submitted that the appellant’s conduct did not deserve a purported summary dismissal. He pointed out that it was only by letter of March 21, 1997 that she was dismissed [2] even though the incident took place some 14 days earlier. And then she was sent home with \$392.15 being her week’s wages earned up to the date of dismissal.

Appeal against Findings of Fact

[8] Mr. King contends that the Magistrate’s findings were erroneous because “the entire circumstances made it incredible that the words were used as alleged.” He suggested that there was a conspiracy between Ms. Desce and Annette Moore to fabricate a reason for the appellant’s dismissal.

[9] In respect of this first submission, we need to reiterate the well established principle of law, strenuously argued by Mr. Thornhill, that an appellate court will only disturb a decision or finding of fact in the court below where there was no evidence at all or only a scintilla of evidence to support the finding – see, for example, *Layson v. Marshall* (Civil Appeal N^o.45 of 1990); *Edwards v. Buxton* (1982) 30 W.I.R. 82; *Powell v. Streatam Manor Nursing Home* [1935] AC 243 at p. 251 per Viscount Sankey L.C.; *Bookers Stores Limited v. Mustapha Ally* (1972) 19 WIR 230; *Peters v. Peters* (1969) 14 WIR 457.

[10] Citations are only necessary from two of those cases to reinforce the principle. In *Layson v. Marshall*, Clifford Husbands J (as he then was) giving the judgment of the then Divisional Court said:

“[The] Divisional Court will not lightly differ from the finding of the Magistrate on a question of fact and will not disturb a judgment of fact unless satisfied that it was unsound. In *Benmax v. Austin Motor Co.* [1955] 1 All.E.R. 326, it was decided that an appellate court, on appeal from a case tried before a judge alone, should not lightly differ from a finding of the trial judge on a question of fact, but a distinction must be drawn between the perception of facts and the evaluation of facts. Where the sole question is the proper inference to be drawn from specific facts, an appellate court is in as good a position to evaluate the evidence as the trial judge, and should form its own independent opinion, though it will give weight to the opinion of the trial judge.”

[11] The reason for the reluctance of an appellate court to interfere with findings of fact by a court below is that “the judge was in a better position to assess the credibility of the witnesses and the value of their evidence” per Berridge JA in *Edwards v. Buxton* (supra at p.87). [3]

[12] In this appeal we find nothing compelling us to interfere with the Magistrate’s finding of fact on the first question, namely, whether the appellant did in fact use the words. He saw and heard the witnesses, resolved discrepancies and disputed evidence and, in the end, preferred the evidence of Ms. Desce to that of the appellant, as he was entitled to do. There was ample evidence upon which he could come to that conclusion as a trier of fact.

Was Summary Dismissal Justified?

[13] Mr. King’s second submission was that, assuming (but not admitting) that the words were used, they did not warrant summary dismissal.

In Counsel’s submission, they did not constitute a threat properly so called in law, because there was no evidence that Ms. Desce had been put in fear that the appellant would execute the threat. Moreover, he contends, the words have to be evaluated in the context of the standards of contemporary society and when that evaluation is made, a court should not find that they were of such a nature and degree as to lead to summary dismissal.

[14] This second submission is of a different quality from the first. It invokes the question: What conduct justifies summary dismissal? Summary dismissal is dismissal without notice. Either party to the individual contract of employment may treat the contract as at an end if the other commits a breach striking at the root of the contract. It is always a question of degree whether conduct goes to the root of the contract or not. *Henry v. Mount Gay Distilleries Ltd* (Privy Council Appeal No.43 of 1998). And it is worth remembering that conduct that was held to justify summary dismissal in one case at one point of legal history may not necessarily have the same consequence today. The familiar phrase of the law that “each case depends upon its own facts” is especially apposite in this area of the common law. The social dynamics of Labour Law exemplify in a stark way the ability of the common law to respond to changing views, values and conditions of society over time. The changes have been more than just changes in the nomenclature and notions of master and servant. They have been attitudinal also. [4]

Review of the Cases

[15] It will be instructive to deal with a few of the cases over the last 150 years to demonstrate how the attitude of the common law has changed towards certain types of employee conduct. One of the earliest cases was *Callo v. Brouncker* (1831) 4 C.&P. 518 where Parke B appeared to lay down rules for summary dismissal. He thought then, that summary dismissal was justified for moral misconduct, habitual neglect or wilful disobedience to the order of a master.

Turner v. Mason

[16] Fourteen years later, in the well-known case of *Turner v. Mason* (1845) 14 M.&W. 112, the Court of Exchequer Chamber found that a domestic servant had been lawfully dismissed for visiting her sick mother against the instructions of her master.

Parke B reflecting the mores of the times held that the mother's illness was "not sufficient to justify her in disobeying his order; there is not any imperative obligation on a daughter to visit her mother under such circumstances, although it may be unkind and uncharitable not to permit her." Moreover, in the nineteenth century one act of disobedience was enough to justify instant dismissal.

[17] By the twentieth century, the harsh attitude of the common law had begun to mellow. Three English cases which we shall discuss later, are illustrative of the point although, for reasons already stated, these cases can only be used as guides. It is also important to appreciate that the changed approach of the common law to the law of master and servant was influenced by the dictum of Sir Henry Maine that there was "a movement from status to contract". Maine had been the author of the view, explained by Sir Frederick Pollock that status was "the sum total of the powers and disabilities, the rights and obligations, which society confers or imposes upon individuals irrespective of their own volition". See Professor Otto Kahn-Freund "Status and Contract in Labour Law" (1967) 30 MLR 635. Implicit in the status of servant were certain duties owed to a master. These included a duty to obey lawful and reasonable orders, a duty of fidelity to the master and a duty to exhibit reasonable care and skill in the performance of work. [5]

[18] On the other hand, nineteenth century theories of freedom of contract promoted the notion that employment should be viewed in the setting of contractual terms freely negotiated and agreed. When full recognition was accorded the concept of the contract of employment, these duties came to be cast in the vocabulary of implied terms in the contract of employment. Thus, it was easy for the common law to adopt the language of contract and hold that summary dismissal was justified where the employee's conduct was of such a kind and degree that it showed that he was repudiating the contract of employment and the employer, notionally accepting the repudiation, was entitled to treat the contract as immediately terminable.

Laws v. London Chronicle

[19] *Laws v. London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All.E.R. 285 is the first twentieth century case to which we turn. There, an employee of the defendant company who had been engaged as an advertisement representative only 3 weeks previously, was told by the managing director not to leave a room. Despite the directive, she followed the advertising manager, her immediate supervisor, out of the room and out of loyalty to him. She was summarily dismissed. A strong English Court of Appeal held that she had been wrongfully dismissed.

[20] Lord Evershed M.R. at p. 287, after citing *Turner v. Mason* (supra) and passages from 25 Halsbury's Laws of England (3rd Edn.) said:

"To my mind, the proper conclusion to be drawn from the passages which I have cited and the cases to which we were referred is that, since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service. It is, no doubt, therefore, generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard – a complete disregard – of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master and that, unless he does so, the relationship is, so to speak, struck at fundamentally." [6]

[21] And later at p.288, Lord Evershed in explaining whether one act of disobedience could justify summary dismissal, put his opinion this way:

"I think that it is not right to say that one act of disobedience, to justify dismissal, must be of a grave and serious character. I do, however, think... that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions..." (emphasis supplied).

His Lordship did not think that on the facts of the case, the employee's conduct amounted to wilful disobedience. Accordingly, he held her dismissal to be wrongful.

Pepper v. Webb

[22] In *Pepper v. Webb* [1969] 2 All.E.R. 216, the Court of Appeal was called upon to decide a case involving a refusal to obey a lawful and reasonable order, a callous attitude and insolence on the part of the employee. Major Webb and his wife owned a large house in Dorking with about 5 or 6 acres of garden. They used to vacation in the Caribbean leaving Mr. Pepper, the gardener, in charge of the property. On their return to England in May 1967 and in the three months leading up to June 1967 they became dissatisfied with Mr. Pepper. "The straw broke the camel's back" on June 10, 1967. Mrs. Webb instructed Mr. Pepper to put in some plants at once or they would die. He replied that he was leaving at noon and "you can do what you like about them. If you don't like it, you can give me notice." Major Webb went into the garden about noon and asked Pepper why he was making such a fuss. Mr. Pepper "peppered" the Major: "I couldn't care less about your greenhouse or your sodding garden!" He was forthwith dismissed.

[23] The Court of Appeal held that his summary dismissal was justified because he had repudiated the contract of service. Harman and Russell LJ were of opinion that he was properly dismissed for the reasons that (i) he had refused to obey the lawful and reasonable order to put in the plants, (ii) he had said that he did not care about the grounds and the greenhouse and (iii) he was insolent to the employer. [7] Karminski LJ justified the Court's decision on the ground of wilful disobedience to a lawful and reasonable order.

[24] Harman LJ asked some questions and answered them at p. 218. He said:

"Now what will justify an instant dismissal? Something done by the employee which impliedly or expressly is a repudiation of the fundamental terms of the contract; and in my judgment if ever there was such a repudiation, this is it. What is the gardener to do? He is to look after the garden and the greenhouse. If he does not care a jot about either of them, then he is repudiating his contract."

[25] Eminent scholars in Labour Law, such as Professor Lord Wedderburn, doubt whether the decision in *Pepper v. Webb* would have been the same were it not for the fact (adverted to by Harman LJ) that there was a three-month history of unsatisfactory conduct by Mr. Pepper. Professor

Wedderburn at page 107 of the second edition (1971) of his book "The Worker and the Law" confidently opined:

"But for that," (i.e. the gardener's continuing unsatisfactory conduct) "the decision might be thought rather old-fashioned. A few swear words would not have altered the decision in Laws' case."

Wilson v. Racher

[26] Pepper v. Webb was considered in Wilson v. Racher [1974] 1CR 428 another case involving a gardener. The Plaintiff had a contract for 6 months from April to October 1972 as the defendant's head gardener. One afternoon in June when it was raining, he put down an electric cutter which he had been using to trim a hedge. He feared that he might be electrocuted. Two days later, the defendant "showered him with questions", shouted at him aggressively and accused him of stopping work early on the day of the rains. There were verbal exchanges between the plaintiff and defendant culminating in the plaintiff's use of obscene language including the following:

"If you remember it was pissing with rain on Friday. Do you expect me to get fucking wet? Get stuffed and go and shit yourself."

[27] He was dismissed. However, the Court of Appeal, taking into account the background of the case including the provocative conduct of the [8] employer, held that the employee had been wrongfully dismissed. Edmund-Davies LJ observed at p.433:

"The present case has to be looked at against the whole background....The Plaintiff lost his temper. He used obscene and deplorable language. He was therefore deserving of the sternest reproof. But this was a solitary occasion. Unlike Pepper v. Webb there was no background either of inefficiency or insolence."

[28] Then, having examined the conduct of the employer, His Lordship asked:

"In those circumstances, would it be just to say that the Plaintiff's use of this extremely bad language on a solitary occasion made impossible the continuance of the master and servant relationship, and showed that the plaintiff was indeed resolved to follow a line of conduct which made the continuation of their relationship impossible?" – (p.433 'E')

[29] Edmund-Davies LJ did not condone the bad language but held that there were special circumstances which gave rise to it and he advised that:

"[I]t requires very special circumstances to entitle a servant who expresses his feelings in such a grossly improper way to succeed in an action for wrongful dismissal."

Cairns LJ concurred in the judgment of Edmund-Davies LJ and introduced an interesting obligation among the several traditional duties of an employee. He was of opinion at p.424 that:

"Another duty on the part of the servant, particularly in the case of a man in such employment as this plaintiff had, a gardener in a domestic situation, is the duty of courtesy and respect towards the employer and his family."

But for Cairns LJ this was not a case where it could justly be said that the plaintiff was deliberately "flouting the essential contractual conditions."

Rouse v. Mendoza

[30] In this region, the High Court of Trinidad and Tobago held in Rouse v. Mendoza (1967) 12 WIR 1 that a clerk who had given 24 years' service was wrongfully dismissed by his employer following a single [9] incident of insolence and bad temper. The clerk who had been called "a liar, a confounded liar" retorted to his employer:

"You are a blasted liar. I am a gentleman inside and outside of here but every body knows that you are a vagabond."

Evan Rees J held that the employee was entitled to 3 months' notice rather than summary dismissal.

[31] In the course of his judgment, the learned judge said at p.4:

"It seems to me that the main question in the instant case is whether this single act of insolence and bad temper on the part of the plaintiff is sufficient ground for his summary dismissal. I find as a fact that he was provoked by the insulting words used to him by his employer and this contributed largely to his outburst of regrettable language after a good and harmonious relationship between the parties for twenty-four years."

[32] After citing Lord Maugham in Jupiter Insurance Co. v. Shroff [1937] 3 All.E.R. 67 (infra), Rees J concluded:

"In the instant case I do not think that this sudden and isolated display of bad temper, accompanied as it was by insulting words to the defendant, in the circumstances such as I have stated, was such as to justify summary dismissal for misconduct. This misconduct was not such as would interfere with the proper running of the business nor was the insolence incompatible with the continuance of the plaintiff's employment."

Layson v. Marshall

[33] Mr. Thornhill places great store by Layson v. Marshall (supra) decided in this jurisdiction. There the employee had worked in the employer's cleaning business for 4½ years. One Friday afternoon when he received his pay packet from the employer's payroll clerk he discovered that his wages were incorrect. In anger he threw the pay packet on her desk and asked, according to the clerk: "What the rass-hole is this?" The employee denied using the words. When seen by the manager to whom the clerk had made a report, the employee went into a silent mode,

stared at her and walked outside. He refused to work and requested his money, which he was given. There was evidence that he blocked the path of the manager before handing over the keys to the van of which he was driver. The next day he turned up for work and was told that he had not been fired but that he should go [10] home. A decision would be made on Monday. On the Monday he was terminated for gross insubordination, threatening words and refusing to commence work.

The Magistrate found that the employee had been wrongfully dismissed but, on appeal by the employer, he was reversed and the appeal was allowed.

[34] Husbands J held that the Magistrate had erred in his evaluation of the facts, “took a very narrow view of the meaning of insubordination and was unmindful that it encompasses not only disobedient but also rebellious behaviour.” The Court said at p.8:

“In our view to utter the words “what the rass-hole is this?” in the presence of a female senior officer at one’s workplace in the circumstances mentioned is to commit an act of misconduct – even in these days of enlightenment and freedom of expression.”

In addition, the Divisional Court found that blocking the passage of the manager was conduct “characteristic of a lout” and “to exhibit this behaviour to one’s employer at the workplace demonstrates quite plainly the intention to bring the relationship of master and servant to an end.”

[35] In the result, the Divisional Court held that upon an evaluation of all of the evidence, the employee’s conduct amounted to misconduct such as was incompatible with the continuance of the relationship of master and servant and his summary dismissal for insubordination and the use of threatening words to his employer was justified.

Jupiter Insurance Co. v. Shroff

[36] The case which was the catalyst for the adaptation of the law to meet changing social conditions was Jupiter Insurance Co. v. Shroff (supra). In that case, a manager of a department in a life insurance company had recommended the issuance of a policy of insurance on a life which the managing director of the company had himself refused to re-insure some days earlier. He was summarily dismissed. The Judicial Committee of the Privy Council held that, on the facts, his conduct could have led to considerable loss and was of an exceptional character and magnitude. Although the conduct justified summary dismissal, the Privy Council held that the employee should have been [11] given three months’ payment in lieu of notice rather than the one month’s payment which he got on dismissal.

[37] However, in delivering the advice of the Board, Lord Maugham said at pp.73-74:

“Their Lordships recognize that the immediate dismissal of an employee is a strong measure, and they have anxiously considered the evidence with a view to determine the question whether the trial judge was right in his finding that the respondent was guilty of gross negligence, which, coupled with his conduct at the interview, was sufficient to justify his dismissal. On the one hand it can be in exceptional circumstances only that an employer is acting properly in summarily dismissing an employee on his committing a single act of negligence; on the other, their Lordships would be very loath to assent to the view that a single outbreak of bad temper, accompanied, it may be, with regrettable language, is a sufficient ground for dismissal. Sir John Beaumont, CJ, was stating a proposition of good sense when he observed that in such cases one must apply the standards of men, and not those of angels, and remember that men are apt to show temper when reprimanded...It must be remembered that the test to be applied must vary with the nature of the business and the position held by the employee, and that decisions in other cases are of little value.”

Distilling the Principles

[38] To the extent that judges have consistently warned that each case of alleged wrongful dismissal has to be adjudicated in the context of its own particular facts, there are few general principles to be abstracted from the reported cases.

[39] In *Re Rubel Bronze and Metal Co.* [1918] 1 KB 315 at 322, McCardie J said:

“In every case the question of repudiation must depend on the character of the contract, the number and weight of the wrongful acts or assertions, the intentions indicated by such acts and words, the deliberation or otherwise with which they are committed or uttered and on the general circumstances of the case.”

[40] Similarly, Edmund-Davies LJ explained in *Wilson v. Racher* (supra at p.430 “B”):

“Reported decisions provide useful, but only general guides, each case turning upon its own facts. Many of the decisions which are customarily cited in these cases [12] date from the last century and may be wholly out of accord with current social conditions. What would today be regarded as almost an attitude of *Czar-Serf*, which is to be found in some of the older cases would, I venture to think, be decided differently today.”

[41] However, it seems that it can be confidently asserted that the right to summary dismissal may be exercised where the conduct of the employee is of such a nature and degree as to evince an intention not to be bound by the terms of the contract of employment.

The Appellant’s Conduct

[42] In this appeal we are considering conduct which was the result of the interaction of human personalities at the workplace and it is necessary to judge that conduct against the totality of facts and circumstances as revealed in the evidence and against the standards of ordinary people and not those of “angels”. The “threat” and obscenity as found by the Magistrate were disgraceful behaviour but anyone who is familiar with the cultural and social attitudes and customs of Barbadians of contemporary times will readily acknowledge that such “threats” and obscenities are commonplace among today’s workforce. That is not to be complacent about such conduct nor is it to be construed as condonation of the diminution in standards of decency or the social value system. For as long as we can remember, Barbadians have been wont “to vent their

spleen" with the indecorous effusions of angry minds, promising or threatening assault and battery but with no real intention to act upon those empty threats.

[43] There was evidence in this case that the mis-spelling of the appellant's name was not a single error. It had happened before. No doubt the appellant construed the error as deliberate. It turned out to be provocative. In the language of our times, "she lost it" and blurted out the offensive expressions. There was no evidence of any other misconduct on the part of the appellant on March 7, 1997. There was no evidence of a history of unsatisfactory conduct and indeed there could hardly have been since she had been continuously employed by the respondent or its predecessors in title for 21 years, except for one occasion when she was suspended because of an incident involving Annette Moore, Ms. Desce's witness in this case. [13]

[44] The appellant's conduct would seem to have been an aberration and we do not accept that the abusive words on this solitary occasion, deplorable though they were, made impossible the continuance of the employer/employee relationship. It is noteworthy that, far from attempting to execute her threat, the appellant expressed herself and left the room without more. Under cross-examination, she said that "nothing happened between me and Ms. Desce that morning. When I spoke to Ms. Desce, we were so close I could have touched her if I wanted." In point of fact, she did not touch Ms. Desce.

Conclusion

[45] It is of considerable importance in the factual context of this case that, after being on suspension for 5 days, the appellant returned to work and did work until her ultimate dismissal on March 19. During this period of resumed duty, there is no evidence that the relations between the employer and employee deteriorated in any way or at all to show that it was impossible to continue the employer/employee relationship.

[46] Having regard to the foregoing observations, the appellant's long continuous employment with the respondent or its predecessors in title and the fact that the conduct complained of was an isolated act of misconduct, it is our judgment that such misconduct was certainly worthy of the sternest censure. But we do not accept that it justified summary dismissal. If dismissal was necessary then reasonable notice or payment in lieu thereof should have been given.

[47] The appeal is therefore allowed and the order of the Magistrate is reversed. Counsel on both sides must get together and compute the appellant's entitlement to damages for wrongful dismissal in accordance with section 45(1) of the Severance Payments Act, Cap. 355A and the First Schedule as amended in 1991.

A Minute of the agreed damages must be submitted to the Registrar within 14 days of this judgment. The appellant will have her costs [14] here and below. The costs in this appeal are certified fit for two Attorneys-at-Law to be agreed or taxed. [15]

Chief Justice

Justice of Appeal Justice of Appeal