

Privy Council Appeal No. 43 of 1998

Evelyn Henry Appellant

v.

Mount Gay Distilleries Limited Respondent

FROM

THE COURT OF APPEAL OF BARBADOS

JUDGMENT OF THE LORDS OF THE JUDICIAL

COMMITTEE OF THE PRIVY COUNCIL OF THE

Delivered the 21st July 1999

Present at the hearing:-

Lord Browne-Wilkinson

Lord Steyn

Lord Hoffmann

Lord Hope of Craighead

Lord Millett

[Delivered by Lord Browne-Wilkinson]

By letter dated 10th February 1993 the appellant, Mr. Henry, was summarily dismissed by his employers, Mount Gay Distilleries. He had been employed by them for nearly 40 years. He brought proceedings for wrongful dismissal. His claim was dismissed by the magistrate, Miss Marva Clarke. Mr. Henry's appeal against that decision was dismissed by the Court of Appeal of Barbados on 29th January 1998 by a majority (Moe C.J. (acting) and Chase J.A., Williams J.A. dissenting). Mr. Henry now appeals to Her Majesty in Council.

The basic facts of the case are not in issue. Mr. Henry was first employed by the employers in April 1953 as a delivery man and porter. After some 16 years he sustained an injury which led him to become a security guard, a position which he held for 26 years. At the material time he was employed as a night security guard at the employer's premises at Brandons. That site, which was approximately two acres in extent, had four buildings erected on it. The whole site was surrounded by walls topped with either barbed wire or broken glass. There were two entrances, one of which was permanently locked and the other of which was the entrance which it was the duty of the security guard, in this case Mr. Henry, to guard.

It was common ground that it was standard procedure governing the employment of security guards that if a security guard discovered a break-in it was his duty immediately to notify management and the police of the break-in.

According to the evidence of Mr. Henry, he went on duty as security guard on the night of Sunday, 31st January 1993, at 10.00 p.m. On taking over he and the guard being relieved checked the site and verified that everything was in order. During Mr. Henry's spell of duty he went on a round at 1.00 a.m. on 1st February 1993. In the course of that round he discovered that the lock to the door to the visitor's centre had been tampered with. He said that he then pulled the door shut and then waited nearby with his dog to see if anyone emerged. He said that he waited until about 4.15 a.m. or even later. No one did emerge and he returned to the guard hut. He was relieved at 6.50 a.m. by another security guard, Mr. Mascoll. On taking over Mr. Mascoll checked the premises and found nothing amiss. However Mr. Henry sent him to look again at the visitor's centre. On the second visit he discovered the injury to the door into the visitor's centre.

Mr. Mascoll asked Mr. Henry whether he had called the police or management. Mr. Henry said that he had not. Mr. Mascoll reminded Mr. Henry of the instructions to inform the police and management. Mr. Henry responded by saying that management would have to believe what he told them, the management would be asleep and he didn't wish to disturb them. Mr. Henry then said it was 7.15 a.m., that he was going home and that if anyone wanted him Mr. Mascoll would know where to find him. At no stage before going home did Mr. Henry notify either management or the police.

On the next day the operation manager of the employers interviewed Mr. Henry. He was unable to extract from Mr. Henry any satisfactory reason why he had not called the police. On 10th February 1993 the employers gave Mr. Henry notice of summary dismissal "for reasons of negligence and carelessness".

The issue at trial was whether the behaviour of Mr. Henry on the night in question was such as to warrant summary dismissal. At the trial, the learned magistrate appears to have had two grounds for her decision. First, she held that it was proper to draw the inference that Mr. Henry had been seriously at fault in allowing the break-in on 31st January to occur at all. She drew this inference on the basis of the geographical features of the site viz. that there was only one entrance to the compound which was the one passing by the security hut: therefore the security guard (even though not proved to have been asleep) must necessarily in some way have failed in his duty. This first ground of decision by the learned magistrate was not referred to by the majority of the Court of Appeal. Their Lordships, likewise, find it unnecessary to rely on these circumstances but feel it right to say that in the absence of direct evidence proving the impossibility of gaining access over the broken glass topped walls their Lordships would find it impossible to draw inferences of gross negligence by the security guard in allowing people through the open entrance.

The second ground relied upon by the learned magistrate was also the basis of the decision of the majority of the Court of Appeal. It also commends itself to their Lordships. It is well established that summary dismissal is only justifiable where there has been a breach of one or more duties of the employee and such breach constitutes a repudiation of the contract of employment as being inconsistent with the continued employment of the employee. Thus a single act of carelessness or negligence can provide grounds for summary dismissal if the negligence itself or the circumstances surrounding it show that there has been a "deliberate flouting of the essential contractual conditions": *Laws v. London Chronicle Limited* [1959] 2 All E.R. 285 at p. 287. The question whether misconduct is such as to justify summary dismissal is a question of fact and degree. As such, it is a matter for decision by the trial judge and not by the appellate courts: *Clouston & Co. Limited v. Corry* [1906] A.C. 122. This principle of non-intervention by the appellate courts in such cases is particularly applicable where, as in the present case, there are concurrent findings of the relevant facts by both the trial judge and the majority of the Court of Appeal in the local courts and the appeal is to their Lordships' Board. Quite apart from the usual rule that their Lordships do not disturb such concurrent findings, in such cases the issue is what constitutes a reasonable response by an employer. Such matters dependent on local conditions are far better decided by a local court with knowledge of local conditions.

On that basis their Lordships turn to consider the learned judge's second ground of decision namely that Mr. Henry, who was well aware of the requirement that guards should at once notify management and the police of any break-in, in this instance failed to notify either of them. Moreover his failure to do so was not due to some casual oversight since Mr. Mascoll at 6.50 a.m. had specifically reminded Mr. Henry of his duty and Mr. Henry still failed to notify either the police or his employers. The terms in which he refused or failed to comply with his duty – "they can find me at home if they please," showed an element of deliberate flouting of his instructions. Moreover a continuing failure by a night watchman to take the most elementary steps to tell those responsible what has occurred indicates a basic inability to carry out the duties for which he was employed. Such in outline were the facts relied upon by the trial judge and the majority of the Court of Appeal in holding that the conduct of Mr. Henry in disobeying his standing instructions in contumelious fashion was sufficient to justify his summary dismissal.

It was for the learned magistrate to decide as a matter of fact and degree whether the breach by Mr. Henry of his instructions was such as to amount to a repudiation by him of an essential term of his contract of employment. In their Lordships' view there was ample material to justify the learned magistrate in coming to the decision which she did on that aspect, especially as the majority of the Court of Appeal have also agreed with that decision. In the circumstances, it would be quite wrong for their Lordships to interfere with the decision appealed from and they decline to do so.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed with costs.