BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 4 of 1998

BETWEEN:

ANGELA BLACKMAN

(Plaintiff/Appellant)

And

THE CRANE ESTATES LIMITED

(Defendant/Respondent)

Before the Honourable Sir Denys Ambrose Williams, Chief Justice, and the Honourable Errol DaCosta Chase and the Honourable Colin Anthony Williams, Justices of Appeal.

2000, July 27; 2001, 3rd April.

Mr Peter Williams, Q.C., and Mr Olson Alleyne forAppellant.

Mr W. LeRoy Inniss, Q.C., for the Respondent.

DECISION

Colin A. Williams, J.A. The plaintiff Angela Blackman entered the employment of the defendant The Crane Estates Limited on the 6th April 1988 as a cashier, and she remained so employed until the 26th February 1997, when she was summarily dismissed. The reason given by the defendant for her dismissal was that she took and consumed a morsel of the defendant's hotel food without following required procedure of writing up a bill for same.

The plaintiff failed in her action for wrongful dismissal in the Magistrate's Court for District "C" .The core of the Magistrate's decision appears in her Reasons as follows:-

"The Appellant was aware of Management's policy with respect to taking and eating the hotel's food without payment. Of this, she was aware firstly in her capacity as an employee

whom there was a duty to have full regard to the rules set down by her employer and, secondly, as a union delegate.In this second capacity she was aware of the fate of other

employees whom it was discovered had taken or received the hotel's food and or drinks without payment. Her actions were in breach of the rules laid down by Management and also constituted theft of the Respondent's property. The Appellant admitted that when she took the fish on the 26th February she understood that it was the hotel's property which she had taken without permission and for which payment was required. She also admitted that she should not have taken /eaten the Respondent's property without first paying for it."

The plaintiff has appealed to this Court against the Magistrate's decision on the following grounds:-

"(1) That the decision is erroneous in point of law:

(a) The Magistrate should have found that the conduct of the Plaintiff in taking apiece of fish did not amount to such a wilful disobedience of an order, or such a deliberate disregard of the conditions of service or a repudiation of the contract as to justify the Defendant in summarily dismissing her;

(b) The Magistrate was in error to consider whether or not the taking of the fish constituted theft as no allegation of theft had been made against the Plaintiff by the Defendant; and

(c) The Magistrate was in error in finding that the Plaintiff was guilty of theft when the elements of the offence had not been established.

(2)That there is no evidence to support the decision or that the decision is against the weight of evidence:

(a) The Defendant gave no evidence, as required, to prove on a balance of probability that it had just cause to dismiss the Plaintiff;

(b) The facts and circumstances of the case did not justify the Defendant summarily terminating the Plaintiff's employment;

(c) The Magistrate failed to take into account that the Plaintiff had not been guilty of any misconduct during her eight years of employment with the Defendant;

(d) The Magistrate did not in her reasons accurately state the evidence of the Plaintiff with regard to the amount of fish taken by her nor did she take into account the fact that the amount of fish taken was a relevant consideration in properly determining the matter; and

(e) The Magistrate did not have any evidence of the value of the said fish, which could not have been significant, nor did she take into account the fact that the value of the fish was a relevant consideration in properly determining the matter."

The only evidence before the Magistrate comprised the oral testimony of the plaintiff and four (4) documents that were admitted by consent, viz., (1) a staff notice dated September 30, 1996; (2) a Termination of Service/Lay-off Certificate under the National Insurance and Social Security Act Cap 47 (3) a letter dated 3rd March 1997 from the plaintiff's attorneys-at-law to the defendant claiming damages for wrongful dismissal and (4) a reply dated the 11th March 1997 from the defendant's attorney-at-law disclaiming liability. The plaintiff's evidence must therefore be accepted at its face value, since no part of it was contradicted or appears to have been discredited by cross-examination or is so manifestly and inherently unreliable as to be unworthy of belief. Accordingly, her evidence stands unchallenged as to the facts and circumstances leading up to her summary dismissal.

More than likely the Magistrate's decision was founded largely by the following evidence of the plaintiff under cross- examination:-

"It's true that I was a Union delegate at the Crane and I used to be called in to help staff whenever there was a dispute. It's within my knowledge that Sharon Browne was dismissed on the same day as me for drinking drinks that she did not pay for. Its also true that Noel Burke was dismissed the week before me but I heard Mr Doyle say that he was dismissed

because he had given a beer to one of his colleagues. I also am aware that Lawrence Alleyne was also dismissed the same week before for receiving the beer. It's true that the Union was called in as a result. As far as I know, those persons just identified did not get back their jobs at the Crane, neither am I aware whether they received money - as I have not

been in contact with them.

"I attended the case with Noel Burke where he was dismissed for taking food. Mr Doyle was not at that meeting, only Mrs Doyle. I do not recall her saying that there was zero tolerance where staff members were found eating the hotel's food. But I am aware that Mrs Doyle did say this.

"On 26th February 1997 when I ate the fish I did not have permission to take it up neither did I pay for it. I understood that it was the hotel's fish that I was taking up. I was aware that I was not to eat the hotel's fish without paying for it. Its true, that's why I offered to pay for it after the fact. "

However, it is well-established law that in these matters all the circumstances of the plaintiff's conduct and the nature of that conduct have to be taken into account. The following is the

plaintiff's evidence of what happened on the 26th February 1997 immediately before her dismissal:-

"On that day I do not recall if I went in for nine or ten o'clock and being the only cashier on the property, I had to do the work from the night before, whenever I got there on mornings.

When I finished the monies for the dinner, I started on the monies for the breakfast which was in progress by the time I got there. Wednesday are very busy at the Crane and by the

time that I finished the breakfast bills it was time for lunch…..

"The 26th of February 1997 was very busy and I was not feeling well that morning. I had a really bad headache and my stomach was upset - this would have been after twelve o'clock. I got up from my seat where I usually sit and I went into the kitchen. Someone had just put some fish fingers into a pan, as we usually have buffet, so I took a piece of the fish and placed it on a napkin. I then went straight back to my work station because there was no cash register and the cash was just there in a pan there open.

" I took a bite of the fish and continued writing up the bills that I had started to do previously. Mrs Newly Doyle came into the restaurant and she saw the fish. She asked me what it was and I told her what it was a piece of fish. She said that if everybody took a piece of fish, then it would mean that her food costs would go up. Before she said about the food costs she asked me who gave me the fish and I said that I had taken it from the kitchen. After she started talking about food costs I asked her if she wanted me to pay for the piece of fish but she said that it was not about the paying for it. She left the restaurant for about ten minutes, then she came back and asked me to come to the office.

"When I got to the office Ms. Doyle, Betty Richards, Steven Goddard along with Newly were there. Mr Doyle spoke to me about eating hotel food without writing a bill. I explained

to him the circumstances surrounding my taking the piece of fish, that I was not feeling well and he told me that I should take a lunch break. I

explained to him that I could not because there was not anyone there to relieve me. I also told him that I did not have anyone to relieve me and the money was just lying around there and if at the end of the shift there was a short then I would have to pay the shortage."

No evidence was given as to the value of the fish finger. But it is common knowledge in Barbados, and this Court can take judicial notice of the fact, that a fish finger is normally a quarter section of a flying fish and that its value could hardly exceed one dollar.

The above evidence contains some of the plaintiff's explanations for her conduct:-

(3) She was really ill but instead of reporting ill she thought a small bit of food would help her to stay at work.

(4) She had to go directly back to her work station, since she was without a cash register and the cash for which she was responsible was in an open pan there.

(5) She was eating the fish quite openly, displacing any suggestion of clandestine or other underhand intention.

(6) She did not take her lunch break because there was nobody to relieve her and she would have had to make up for any missing funds if she left them unprotected.

The plaintiff expanded on her difficulties at pages 12 and 13:-

"1 did not have a cash register. It was taken from the property just before the ending of 1996 to be programmed for VAT - up until the time of my dismissal. The pan from the cash register was kept where the cash register used to be and I used to put the cash in that pan.

There were no arrangements for my being relieved to lunch, the bathroom, etc. Before when we had a lot of staff, a Supervisor used to come and relieve me to go to lunch. If I got anything to eat then someone would have to bring it. It would be right beside me, where the money is and I would have to eat while taking money from waiters, guests or writing up

the bills."

In my opinion, the unchallenged evidence of the plaintiff paints the picture of a person who was working under significant difficulties which were not of her own making and for which the defendant must bear responsibility. As a result, she regularly worked beyond the call of duty by taking her meals at her work station in order to ensure the safety of her employer's cash and to avoid responsibility for having to make up any shortage, because nobody was assigned to relieve her.

In my view, the plaintiff's conduct on the day of her dismissal did not show that she was repudiating the contract of service or one of its essential terms because (as already stated) we cannot look at her conduct in isolation and without regard to its context and background. It was no doubt unwise of her to take the fish in the light of the contemporaneous dismissals of other staff; but at the same time, so far from evincing an intention to repudiate the contract of employment, it seems rather to have been calculated to expedite her duties as cashier and to maintain the easy flow of work in the restaurant.

Reference has already been made to the plaintiff's admission under cross-examination that she was aware that Mrs Doyle had said there was zero tolerance where staff members were found eating the hotel's food. But where does that take the matter? I interpret that expression to mean that management would take a very serious view of any employee who breached the rule. But the fact that the plaintiff (or any other employee for that matter) was in breach of the rule does not obviate the need to examine the employee's conduct in its context and in the light of all relevant circumstances.

The plaintiff also admitted that she was aware of the dismissal of Sharon Browne, Noel Burke and Lawrence Alleyne. In my opinion, however, since we do not know the full circumstances of their misconduct, we cannot usefully compare or contrast them with the present plaintiff's situation.

Three of the cases cited before us were helpful. Browne v S.E. Hampshire (1983) unreported but mentioned at page 89 of Whincup's "The Right to Dismiss" easily distinguishable: Browne was a kitchen superintendent who deliberately removed food and hid it, i.e., his clear intention was to steal it and there were no mitigating circumstances. In Wilson v Rachen [1974] ICR. 428. judgment was given for the plaintiff although he had used obscene language to his employer in the presence of the latter's wife and young children as he passed his employer's home; but having considered the circumstances of his misconduct, the Court found that the plaintiff did not deserve summary dismissal because the employer himself created the situation by provoking him, and the plaintiff had used the words when under pressure of a difficult situation. Laws v London Chronicle [959] 2 All E.R. 285 is usually referred to for its statement of general principles, but its facts are striking: the plaintiff disobeyed a direct order from the chairman and managing director of the defendant company not to leave a certain company meeting. Taken by itself, this single act of disobedience might have justified summary dismissal. But the meeting was one at which an unseemly dispute broke out between the chairman and the managing director of the company and the plaintiff's immediate boss. The latter left the meeting and told the plaintiff to follow him (which she did) .The Court did not look only at the plaintiff's conduct but considered the circumstances in which it occurred - circumstances which had been created not by herself but by her superiors - and found for the plaintiff.

The plaintiff's situation in the present case is in many respects like that of the plaintiffs in Wilson v Rachel and Laws v London Chronicle. She found herself working in a difficult situation which was not of her own creation, yet she adapted her work schedule to safeguard herself and to avoid disruption in the restaurant. Indeed, in my view, her taking the fish finger was itself calculated to avoid her reporting ill and returning home and to permit her to remain at work and assist in the smooth running of the restaurant to the ultimate benefit of the hotel.

The plaintiff's action in taking and consuming the fish finger has been characterised as theft, both by Counsel for the defendant in his address and by the Magistrate. The Theft Act Cap 155

provides at section 3(1) :-

"A person who dishonestly appropriates property belonging to another with the intention of permanently depriving the other of that property is guilty of theft and liable on conviction on indictment to imprisonment for 10 years".

Then at section 4 the Act makes the following provisions:-

(1) "a person's conduct is not to be regarded as dishonest

(a) ……..

(b) where he appropriates the property believing in good faith that he would have the consent of the other person if that person knew of the appropriation and the circumstances of it; "

"(2) A person's appropriation of property belonging to another may be dishonest notwithstanding that he is willing to pay for the property. "

When one considers the difficult circumstances in which the plaintiff was carrying out her duties for about 2 months immediately preceeding her dismissal (circumstances that were of the company's making and were well known to the company) and that she took and consumed the fish finger quite openly, it seems inconceivable to me that the plaintiff was flying in the face of the regulations and thereby putting her job on the line, rather than that she was confident that her superiors would overlook and/or sanction her conduct. In my opinion, therefore, the plaintiff's actions fall squarely within the 4 corners of section 4(1) (b) of the Act.

Further, Section (4) (2) clearly contemplates, by the use of the word "may", that willingness to pay for the property may sometimes exculpate a person who is accused of theft. Obviously, whether this provision could be prayed in aid would depend on all the circumstances of the case; and clearly too, it could hardly avail a person who surreptitiously appropriates goods and offers to

pay for them only after the goods have been found and traced to that person. But in a case like the present, where there is no suggestion of clandestine conduct and the plaintiff offered to pay for the fish finger after Ms Doyle questioned her about it, I find it very difficult to believe that the plaintiff would not be acquitted on a criminal charge of theft.

Some support for my view on the question of theft can be found in two other areas of the evidence. First, there is the inconsistency of the defendant (not, however, amounting to estoppel) in making no mention whatsoever of theft in the Termination of Service/Lay-off Certificate and then alleging theft at the trial. Secondly, Mr Doyle himself showed that he had misgivings about the plaintiff's dismissal when, at the end of the meeting at which her employment was terminated, he told the plaintiff not to take the paper for the dismissal to the National Insurance Office right away

but to call him later in the evening, and when the plaintiff called him, he explained that he wanted to see if there was another way he could deal with the matter but he could not.

When all is said and done, this Court has to do a kind of balancing or comparison exercise by examining the taking by the plaintiff of a fish finger worth no more than a dollar against the background of 8 years' unblemished service, the difficulties in which the plaintiff had to work for at least 2 months before the dismissal and the reasons for her taking the fish finger. When such an exercise is done, I have no hesitation in finding in favour of the plaintiff.

I would therefore allow the appeal, set aside the Magistrate's decision and give judgment for the plaintiff for $9,400.00 with interest thereon at 4 per cent from the filing of the action in the Magistrate's Court until the decision of the Magistrate on the 24th April 1998 and thereafter at 8 per cent until payment. The plaintiff should also have her costs here (certified for two attorneys-at-law) and in the Court below.

Chief Justice

Justice of Appeal Justice of Appeal