

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE  
COURT OF APPEAL**

**Magisterial Appeal No. 2 of 2012**

**GLASSESCO LIMITED                      Appellant**

**AND**

**ST. CLAIR GREENIDGE                      Respondent**

**Before: The Hon. Sir Marston C.D. Gibson, K.A., Chief Justice, The Hon. Sandra P. Mason and The Hon. Kaye C. Goodridge, Justices of Appeal.**

**2016: October 25**

**2017: June 29**

**Mr. Marlon M. Gordon for the Appellant.**

**Ms. Jaydene O. Thomas for the Respondent.**

**DECISION**

**MASON JA:**

**Introduction**

[1] This appeal came on for hearing on 25 October 2016. After deliberation, the Court dismissed the appeal with reasons to follow. The Court further determined that since there had been no challenge to the award of damages, the respondent was entitled to the sum as determined by the magistrate and to his costs in this Court and the court below.

[2] We now give our reasons.

## **Background**

- [3] This wrongful dismissal action was commenced on 8 November 2007 in the District “A” Magistrate’s Court, civil jurisdiction. The respondent’s claim was for loss of wages, damages and costs on account of his having been summarily dismissed by the appellant without just cause and reasonable notice.
- [4] On 14 November 2012, the magistrate determined the matter in the respondent’s favour.
- [5] On 20 November 2012, the appellant filed a notice of appeal, the sole ground of which was that the magistrate “erred in ruling that the Appellant wrongfully dismissed the Defendant/Plaintiff (sic) for fighting on the work premises and bringing the work place into disrepute”.

## **Facts**

- [6] The respondent was employed as a glass cutter at the appellant company for over 19 years. There were some magazines which the company used to show options to customers for custom made shower curtains. According to the respondent, it was not easy to access these magazines but he had managed to access one from another company.
- [7] On the day in question, the respondent had left his magazine in his department to walk a customer to the door. On his return, he noted that his magazine was missing. He went to the cashier, Mrs. Cox, who had his magazine. It had

come into her possession when another employee told her that the respondent had her magazine and Mrs. Cox had told that employee to bring the magazine to her.

- [8] The respondent asked Mrs. Cox to return the magazine and she refused to do so. They struggled over it. In the struggle Mrs. Cox claimed that her finger got hurt and she cuffed the respondent in the chest. The respondent recovered his magazine and left. Mrs. Cox later learnt that it was not her magazine and she told the employee who had initially informed her about the magazine to apologise to the respondent on her behalf. Sometime after that, the respondent came up to Mrs. Cox and slapped her in the face with the magazine. A customer as well as other staff members were present during the altercation.
- [9] Mrs. Cox reported the matter to the manager, Mr. Thompson, who sent the respondent home. The respondent was subsequently dismissed.

### **Magistrate's Decision**

- [10] In her reasons for the decision, the magistrate determined that while there had been an altercation between the parties, the tug of war over the magazine was not in itself fighting. In addition, while the circumstances did get out of control and the parties had both misconducted themselves thereby bringing the appellant's business into disrepute, this was a singular act of misconduct by an employee who had never been warned of any prior misconduct. The magistrate further determined that there was no set policy on fighting which

would satisfy established requirements and that the type of behaviour complained of was known to occur with impunity at that workplace.

### **Submissions by Counsel**

[11] Mr. Marlon Gordon, counsel for the appellant, in his opening statement before this Court, declared that he could not “fault or take issue with” the magistrate’s finding that there was no fight. He contended, however, that there had been a breach of accepted work protocol which justified the appellant’s decision to dismiss the respondent. Counsel submitted that this misconduct was incompatible with the respondent’s duties as an employee and it prejudiced the appellant’s business.

[12] In support of this stance, Mr. Gordon cited Schroeder JA in the Canadian case of **R v Arthurs, exparte Port Arthur Shipbuilding Co. (1967) 62 DLR (2d) 342 at 348** that:

“If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence, or conduct incompatible with his duties, or prejudicial to the employer’s business, or if he has been guilty of wilful disobedience to the employer’s orders in a matter of substance, the law recognises the employer’s right summarily to dismiss the delinquent employee.”

[13] In requesting the Court to review the evidence, Mr. Gordon reminded the Court of its power to review which it could exercise when either because the reasons given by the trial judge were unsatisfactory or because from the

evidence it appeared that the trial judge had not taken proper advantage of having seen and heard the witnesses.

[14] Mr. Gordon further argued that the severity of the incident was a cogent factor to be taken into account. This, counsel suggested, was compounded by the respondent's refusal to apologise when asked to do so by the manager as a consequence of which the appellant could not continue to have confidence in his relationship with the respondent. Mr. Gordon submitted that the respondent's conduct in the presence of the appellant's customers was seen to be repudiating the concept of master and servant in that the respondent was not in a position to be controlled by the appellant. Mr. Gordon noted that, despite the finding by the magistrate that there had been no set policy in force about behaviour in the work place, it is an implied term of the employer/employee contract that there must be restraint in behaviour so as not to bring the employer's business into disrepute. Counsel cited the cases of **Pearce v Foster (1886) 17 Q.B.D. S 36 (Pearce v Foster); Clouston & Co v Corry [1906] AC 122** and **Izzard v Cosmopolitan Industries Ltd [2002] SJ No. 361 (Izzard)**.

[15] Mr. Gordon recalled and accepted the established principle which was the conclusion of the Ontario Court of Appeal in **Stillwell v Audio Pictures Ltd (1955) O.W.N 793 (C.A.) (Stillwell)** and which was cited by this Court in **Hilton International (Barbados) Ltd. v Boyce (1996) 52 WIR 59 at 62:**

“It is only in exceptional circumstances that an employer is justified in summarily dismissing an employee upon his making a single mistake or misconducting himself once. The test in these cases is whether the alleged misconduct of the employee prejudices the safe and proper conducting of the business of the company, and therefore justifies immediate dismissal.”

Mr. Gordon suggested that the circumstances of the present case constituted exceptional circumstances.

[16] In response, Ms. Jaydene Thomas, counsel for the respondent, very succinctly stated that based on the appellant’s ground of appeal and given counsel for the appellant’s admission that there had been no fighting, it could not be argued that a fight led to the business being brought into disrepute.

[17] Ms. Thomas then sought to distinguish the case of **Izzard** which had been cited by Mr. Gordon. She noted that as that case pointed out, there must be some serious misconduct or substantial incompetence. She stated that the question of whether misconduct is serious enough to justify dismissal would be a question of fact to be assessed individually in each case. Ms. Thomas countered that in light of the fact that the magistrate had determined that there was no fight, the appellant had failed to show that whatever had occurred was serious enough to warrant summary dismissal.

[18] In support of her contentions, Ms. Thomas cited the following cases: **Eudese Ramsay v St. James Beach Hotels Services Limited Magisterial Appeal No. 4 of 1999 (Eudese Ramsay); Barbados Plastics Ltd v Taylor (1981) 16**

**Barb. LR 79; Wilson v Racher [1974] ICR 428; Moroz v Avco Financial Services (1981) 7 ACWS (2d) 325; Taylor v Parsons Peebles Ltd (1981) IRLR 119 (Taylor v Parsons); Pearce v Foster and Stillwell.**

### **Issue to be Determined**

- [19] There having been an unchallenged finding by the magistrate and a concession by the appellant that there was no fighting in the work place, the sole issue for determination by this Court is whether the incident which occurred was conduct sufficient to justify the respondent's summary dismissal.

### **Discussion**

- [20] We are in agreement with Mr. Gordon that given the right circumstances, this Court can review the findings of fact of a judge sitting alone. Although the general principle is that an appellate court should not lightly differ from the finding of a trial judge on a question of fact, a distinction in this regard must be drawn between the perception of facts and the evaluation of facts. However 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: see: **Eudese Ramsay and Layson v Marshall Civil Appeal No. 45 of 1990.**
- [21] In the case of **Oscar Lovell v Rayside Construction Limited Magisterial Appeal No. 16 of 2004 (Oscar Lovell)** this Court stated that it is the function

and duty of the magistrate to make findings of fact and to apply the law to those findings in order to clearly show that his decision is justified. The Court also held that the appellate court can view the magistrate's decision in the context of the material evidence and submissions at the trial, in order to determine whether, when all of these are considered, it is apparent why the magistrate reached the decision that he did. If satisfied that the reason is apparent and that there is a valid basis for the judgment, the appeal will be dismissed. If despite this exercise, the reason for the decision is not apparent, then the appeal court will have to decide whether itself to proceed to a rehearing or direct a new trial.

[22] We are satisfied that the magistrate in this case appropriately and adequately executed her functions.

[23] This is a case of wrongful dismissal. In order to justify an employee's dismissal, the onus is on the employer to establish that there exists just cause, which cause must be objectively determined. The usual definition of just cause is misconduct inconsistent with the express or implied conditions of service.

[24] In **Oscar Lovell** this Court noted at paras 42 and 43:

“[42] Courts have indicated that an analytical approach should be adopted when considering whether summary dismissal is justified. Because there is no fixed rule defining the degree of misconduct which will justify summary dismissal, each case must be examined on its own particular facts and circumstances

and the nature and seriousness of the infraction considered in order to assess whether it is “reconcilable with sustaining the employment relationship.”

[43] This treatment was underscored by a review of the case law made by Sir David Simmons CJ in **Eudese Ramsay v St. James Beach Hotels Services Ltd, Magisterial Appeal No. 4 of 1999, unreported decision of 26 June 2002**. In that judgment the Chief Justice cited with approval the words of McCardie J in **Re Rubel Bronze and Metal Co. [1918] 1KB 315 at page 322**:

“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 or the general circumstances of the case.”

[25] In the case of **Eudese Ramsay**, the Court distilled the following principle:

“... 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.”

[26] The contract of employment may contain certain policies and rules, breach of which can constitute cause for dismissal. However, before this breach can be invoked, the policy or rules must inter alia, have been distributed to the employee who must be warned that breaches will lead to dismissal and the policy must be consistently enforced.

[27] The evidence in the case at bar disclosed that there was no established policy about fighting in the workplace. Both the respondent and the appellant’s manager, Mr. Thompson, gave evidence that there was no written policy.

[28] Mr. Thompson in his evidence in chief stated “There is a policy from company on conduct this is that it would not be tolerated, especially no fighting particularly when customers are around. I don’t know if he was aware of it – I figure so because it is a retail hardware business.” In cross-examination, he admitted that while the company had a policy of no fighting, it was not in writing and he had no knowledge whether the respondent knew of it but that he, Mr. Thompson, took it “for granted” that the respondent knew of it.

[29] Mr. Gordon suggested and it is agreed, that absence of a written policy notwithstanding, there was implied in the contract of employment between the appellant and the respondent the understanding that the respondent would behave in a certain manner and not engage in fighting or conduct which would bring the appellant’s workplace into disrepute. Viewed objectively, there can be no doubt that this is a reasonable term which is necessary to give efficacy to the employment relationship. This was evidently accepted by the respondent. In cross-examination while denying that he had been fighting, he agreed that certain behavioural standards were expected of him as an employee. He revealed however, that despite the unwritten rule against fighting, there had been prior incidents of fighting at the company even involving the manager and no one had been disciplined. This fact in our opinion would therefore have implications for the possible enforcement of the unwritten but realistically enforceable policy of no fighting being allowed in

the workplace. In other words, the impression could have been created that fighting was allowed on the company's premises.

[30] Mr. Gordon further contended that because the respondent refused to apologise for his supposed infraction, this impaired the employer/employee relationship. As found by the magistrate, this contention cannot be sustained. According to the evidence, when in cross-examination Mr. Thompson was asked whether he had requested the respondent to apologise, his answer was "No. I left it to him to decide what he wanted to do. It was not in my place to ask him to apologise".

[31] In determining whether just cause for dismissal exists, consideration must also be given to the principle of proportionality. This was the opinion of the Supreme Court of Canada in the case of **McKinley v BC Tel [2001] DLR 385** where Iacobucci J in giving the judgment of the Court, stated at para 53 of the judgment:

"An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed. The importance of this balance is better understood by considering the sense of identity and self-worth individuals frequently derive from their employment."

[32] The authorities also indicate that while a single act may justify summary dismissal, the supposed misconduct cannot be considered in isolation. It is established that misconduct must be more serious in order to justify the termination of a senior, long service employee who would have made some

contribution to the company. In general, this type of employee's conduct must be of "such magnitude as to overshadow the years, loyalty and efforts devoted to the employer by the employee".

[33] In this instance, we have an employee of long standing, with an otherwise unblemished record of over 19 years involved in a fracas with another employee who the evidence suggests was the aggressor and who had managed to retain her employment.

[34] In **Eudese Ramsay** this Court made an observation which can quite appropriately be applied to this case:

"... the appellant's long continuous employment with the respondent ... 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."

[35] Mr. Gordon also suggested that the incident fitted into the category of "exceptional circumstances" justifying immediate dismissal. We are of the opinion that even if it could be said that this incident which took place in the presence of 5 members of staff and one customer was enough to bring the appellant's business into disrepute thereby justifying summary dismissal, it then called for a thorough investigation.

[36] The evidence elicited from Mr. Thompson indicated that in addition to not being personally present at the time of whatever occurred, he did not undertake any proper investigation. Although other employees were present,

their evidence was not sought. Mrs. Cox complained to him and he spoke to the respondent in Mrs. Cox's absence. When the respondent was asked if he had anything to say, the respondent replied that he had been "standing up for his rights". Mr. Thompson did not seek to determine what those "rights" were. He relied solely upon the report made by Mrs. Cox who also told him that she had informed her husband of the altercation and the husband had come to the business place "with a wheel tool in his hand". Mr. Thompson's concern then became the possible legal repercussions for the company. He sent the respondent home while he, Mr. Thompson, mulled over the matter. He dismissed the respondent a week later.

[37] In the case of **C.O. Williams Construction Limited v Frederick Kenmore Dash Magisterial Appeal No. 7 of 2008**, this Court stressed the importance of proper and professional investigation of misconduct prior to dismissal while noting that investigation of an allegation of misconduct is an integral part in the determination of wrongful dismissal cases. The Court also stated at para 45:

“[45] At common law, where the relationship between the parties is governed by a contract of employment, the employer is under no legal duty to provide a fair hearing to an employee before terminating the employment contract. However, an employer who fails to conduct an adequate investigation into an allegation of misconduct against an employee may run the risk of not being able to prove that there was just cause for dismissal.”

[38] This requirement for an investigation is buttressed by the following learning from *Selwyn's Law of Employment, 6<sup>th</sup> Edition, Butterworths*, where it is posited:

“... for all acts of misconduct, the employer must show that he gave the matter a prompt and thorough investigation, that he gave the employee an opportunity to state his case, interviewed witnesses and collected evidence so far as it was possible to do so. To deal with such conduct, the employer must consider the gravity of the offence, its effect on the employment generally, and the previous history of the employee. In other words, the employer, it is submitted, must take into account the offence, and the offender.”

[39] We are in agreement with the magistrate and have determined that what transpired on the day in question between the respondent and Mrs. Cox was not sufficiently egregious to violate or undermine the obligations inherent in an employment relationship of over 19 years and that the respondent was wrongfully dismissed.

### **Disposal**

[40] In light of the foregoing, the appeal is dismissed and the magistrate's order affirmed. The respondent is entitled to the award of damages sought in his claim and to costs in this Court and the court below. These sums are to be paid on or before 30 September 2017.

**Chief Justice**

**Justice of Appeal**

**Justice of Appeal**