BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Magisterial (Civil) Appeal No. 3 of 2018

BETWEEN:

THELMA MAPP **Appellant**

AND

DONNA LEE **Respondent**

Before: The Hon Rajendra J. Narine Justice of Appeal and the Hon. Margaret A. Reifer and the Hon. William J. Chandler, Justices of Appeal (Acting)

2019: 24 October
4 December
2020: 15 July

Mr. Clement E. Lashley, QC in association with Ms. Honor Chase for the Appellant
Mr. Deighton K. Rawlins for the Respondent

REASONS FOR DECISION

REIFER JA (Ag.):

INTRODUCTION

[1] This magisterial appeal is against the decision of the magistrate for Holetown delivered by that court on the 11 April 2018. In that decision the magistrate

found that the plaintiff/respondent had been constructively dismissed and was entitled to the damages claimed.

[2] The appeal was heard by this Court on 24 October 2019.

[3] The appellant sought an order to set aside the decision of the Learned Magistrate together with an award of costs in this Court and in the court below.

[4] On 4 December 2019, this Court orally stated that the appeal was dismissed with costs to the respondent with Reasons to follow. These are the Reasons.

THE FACTUAL MATRIX

[5] The appellant employed the respondent as one of 4 auxiliary nurses who cared for her ailing husband at their home in St. James. He required 24 hour nursing care and the 4 nurses were organized on a shift system.

[6] The respondent was in the employ of the appellant for a period of about 3 years from 2013 to 2016. There were no complaints on the record or in the magistrate's notes of evidence about her service performance. In fact, when cross-examined the appellant spoke well of the respondent and stated with reference to her care of the appellant's husband: "She tended him well."

[7] On or about 21 July 2016 the respondent, being rostered to carry out a shift from 8 p.m. to 8 a.m. called the appellant before her scheduled 8 p.m. start. (At page 3 of the record her evidence is that she called at 7.30 p.m. and the

evidence of the appellant's son was that his mother called him after she had received this call sometime between 7 and 8 p.m. and he got to his mother's house between 7 and 8 p.m.). The respondent informed her that she would be late that night and estimated her arrival at between 8.30 and 9 p.m.

[8] The appellant consented. The undisputed record shows that she told the respondent that it was 'quite okay'.

[9] It is to be noted that there is a conflict in the evidence as given by the respondent as to whether the respondent was rostered 8 p.m. to 8 a.m. or as stated by the appellant and her son 7 p.m. to 7 a.m. However, what is material in the opinion of this Court, is that there is no dispute as to whether she called, the time of her call and the fact that the appellant consented to her late arrival.

[10] The evidence of the respondent is that she arrived at the home at about 8. 45 p.m. She was however unable to gain access to the property because the gate was locked and although she pressed the bell at the gate, no one responded. She also called out for several minutes without there being any response. She was there, according to her evidence, for about 5 to 10 minutes. Thereafter she returned to her home.

[11] It was her evidence that the gate was not usually locked. It was the evidence of the appellant's son that the gate was not locked, but that it had a lock (see pages 11 and 12 of the Notes of Proceedings).

[12] The respondent stated in evidence which is consistent with that given by the appellant and her witness, that when she arrived the appellant's son's vehicle was parked at the gate, in front of the yard.

[13] When she arrived at her home that night she called the appellant's phone but she got no response. She did so again the next morning. The next morning she also visited the appellant's residence. She pressed the bell for several minutes but got no response. Thereafter, her phone calls to the appellant went unanswered. She discovered from one of her colleagues on the morning of 22 July 2016 that the appellant's husband was being placed in a nursing home.

[14] There is no evidence that the appellant, as employer, herself informed the respondent that her husband was now in the care of a nursing home and her services no longer required or for that matter, that she (the respondent) had abandoned her work and the consequences thereof.

[15] The case for the appellant is that the respondent failed to turn up for duty. She had to call around to secure the services of another nurse **after the respondent did not turn up for work** and on the advice of that nurse she placed her husband in a nursing home on the very next day, 22 July 2016. The clear implication of this evidence was that the decision to place the appellant's husband in care was as a result of or fundamentally determined by the respondent's failure to report for duty as asserted at Ground (b) of the Notice

of Appeal. At page 7 of the magistrate's Notes of Proceedings, the appellant is recorded as stating as follows: "The decision was made to put him in the home from that Friday morning. I did not dismiss Ms. Lee. I doubt if she had attended work that night if we would have put him in a home. She attended him well."

[16] It is clear however, that immediately after or shortly after the respondent's call, the appellant called her son to express concern about being alone with her husband. It is also evident that at some undetermined time the medical condition of the appellant's husband deteriorated. We think it reasonable to conclude on a balance of probabilities that this deterioration occurred after the respondent's call to the appellant and explains why the appellant so graciously acceded to the respondent's notice of her late arrival by saying that it was 'quite okay'. It was the appellant's evidence that it was the advice of one of the nurses who responded to her calls that night, that she should place her husband in a nursing home in the interest of his 'continual care'.

[17] It was also the appellant's evidence that the nurse secured by her came to the house around 11 p.m., this being after the alleged reporting for work by the respondent. In her words as recorded by the magistrate: "My husband had to be placed in the home because around 11 p.m. when I got a nurse to come and

see him he was sweating profusely and he was lifeless. I had to get her because I was scared."

[18] The appellant and her son asserted in evidence that they were at home at the time alleged by the respondent that she presented for work and that they neither saw or heard the respondent. They asserted that if she had pressed the doorbell they would have heard her from whatever part of the house they happened to be at that time. The appellant stated in evidence as recorded by the magistrate: "My front gate is always open and we sat in the front living room so we could hear if they call. We heard nobody."

[19] The obvious effect of the decision and action of placing the appellant's husband in a nursing home was that the services of the respondent and the other 3 auxiliary nurses were no longer required. Their contracts of employment were effectively determined.

[20] The respondent has been paid all vacation pay due her in accordance with her statutory entitlement, but has been refused a severance entitlement calculated at $3,807.69. There appears to be no dispute that the respondent, but for the issue of abandonment of work/constructive dismissal would be entitled to damages calculated in accordance with section 45(1) of the Severance Payment Act, Cap. 355A in the above amount.

THE MAGISTRATE'S DECISION AND REASONS GIVEN

[21] The Statement of Claim filed in the Magistrate's Court alleged wrongful dismissal; in other words, dismissal without just cause under the common law. More specifically, the plaintiff/respondent alleged that she was constructively dismissed. On the other hand, the defence to this claim was that the plaintiff/respondent had abandoned her job.

[22] The magistrate outlined the evidence before her noting where there were conflicts, but made a finding that the evidence of the plaintiff/respondent was more credible. In other words, she accepted the plaintiff/respondent's recital of events on the balance of probabilities.

[23] Significantly, the magistrate noted in her reasons for decision that one incident of absenteeism without more is not cause for summary dismissal. This is in keeping with our understanding of the law. The following paragraphs encapsulate the magistrate's reasoning/rationalization of her decision:

> "If the Plaintiff was absent on the 21st July, the Court must consider her employment history with the Defendant and go on to consider any possible prejudice to the Defendant that the absence might have caused.
>
> The Plaintiff worked for the defendant for about three years. No evidence was led to prove that she had a history of absenteeism, lateness or that she was a bad worker. To the contrary the Defendant stated, "She tended to him well."
>
> While the Court accepts that the Defendant would have suffered some anxiety and inconvenience if she had to find another nurse if the Plaintiff had not turned up, the Court is of the view that that was not sufficient to constructively dismiss the Plaintiff.

> The Court accepts the evidence of the Plaintiff that she did turn up for work and was denied access to the Defendant's residence. Therefore the Court finds the Defendant's decision to place her husband in a nursing home, amounted to constructive dismissal of the Plaintiff and the Plaintiff is entitled to the damages claimed."

ANALYSIS AND DISCUSSION

[24] We begin by reminding ourselves of the appellate function or role.

[25] The standard or basic principle is that the decision of the lower court is always accorded a large measure of respect despite the wide power of a court of appeal to review or rehear, as provided for in **section 61(1) (e)** of the **Supreme Court of Judicature Act, Cap. 117A**. This is sometimes referred to as the policy of restraint. This principle stipulates that it is only where the lower court is found to have committed an obvious mistake of fact, or an error of principle or followed a seriously defective procedure, that an appeal court will disturb its decision. Stated differently, an appeal court on review may interfere with a lower court's decision only if it reaches the conclusion that it was wrong in substance or in process. An appeal court will defer to it even though it would have dealt differently with the matter.

[26] That this is the approach of the Barbadian Courts is amply demonstrated by a multiplicity of decisions of this Court. One such case is **Eudese Ramsay v St. James Beach Hotels, Magisterial Appeal No. 4 of 1999** where **Simmons CJ** (as he then was) made this statement of principle in the following words:

"an appellate court will only disturb a decision or finding of fact where there was no evidence at all or only a scintilla of evidence to support the finding..."

[27] More recent examples of this approach can be seen in the following judgments of this Court: **Trimart Inc. v Glenda Knight Civil Appeal No. 9 of 2014 (unreported), Ward v Walsh et al Civil Appeal No. 20 of 2005 (unreported), E. Pihl and Sons A/S (Denmark) v Brondum A/S (Denmark) Appeal No. 24 of 2010** to name a few. All such have endorsed the principles enunciated by **Lord Diplock** in **Hadmor Productions Ltd v Hamilton [1983] 1 AC 191 at pages 220-221**, and **Lord Wolf** in **AE1 Rediffusion Music Ltd. v Phonographic Performance Ltd. [1999] 1 WLR 1507 and Benmax v Austin Motor Co. Ltd. [1995] 1 All ER 326.**

[28] It is against the background of this statement of principle that we look at the details of and Grounds of Appeal filed by the appellant 4 May 2018. They are as follows:

"**2. Details of:**

(a) The Learned Magistrate erred in Law in finding that there were no complaints against the Respondent during her 3-year period of employment and consequently she was wrongfully dismissed.
(b) The Learned Magistrate was wrong in Law to ignore the independent evidence of witness Marilyn Patrick and consequently came to the wrong conclusion.

3. Grounds of appeal:

(a) The decision of the Learned Magistrate was against the weight of the evidence.

(b) The Learned Magistrate failed to attach sufficient weight or any weight to the evidence that the Respondent failed to turn up to her work schedule on Thursday the 21st April 2016 thus creating a crisis and placing the appellant's husband in danger.

(c) There was a fundamental breach by the Respondent of her Contract of Service and consequently there was a repudiation of her Contract of Service."

[29] A look at the same reveals that the appellant is appealing against the findings of fact made by the magistrate. At page 4 of his written submissions counsel for the appellant made his defining submission in the following terms:

> "10. It is my submission that as long as it could be shown that the Respondent did not attend on the 21st July 2016 she had fundamentally breached her contract see (Pepper v Webb [1969] 2 All ER 216)."

[30] While the appellant at Ground (b) assertively alleges that the respondent, by her failure to turn up for work created a crisis and placed the appellant's husband in danger, the real challenge is as stated above, that the respondent "failed to turn up to her work schedule on Thursday the 21st April 2016.".

[31] The magistrate's reasoning shows that her defining finding of fact is whether the respondent turned up for work on 21 July 2016 and was unable to enter her place of work. Such a finding would effectively nullify the appellant's case that the respondent abandoned her work and was in fundamental breach of her contract of employment.

[32] But as pointed out by the trial magistrate, this of itself without more could not have been sufficient to justify summary termination of the respondent's

contract of employment. In other words, one act of repudiation without more cannot justify summary dismissal. In every case there must be an examination, *inter alia*, of 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: see **Re Rubel Bronze & Metal Co. [1918] 1KB 315** cited by counsel for the appellant and **Laws v London Chronicle (Indicator) Newspaper Ltd. [1959] 2 All ER 285** an old authority which is still considered good law. See also **The Law of Dismissal in Canada by Howard Levitt 2nd Ed at 602.11 Absenteeism or Lateness**.

[33] This Court, in a very recent decision (per Burgess JA as he then was) **Marcus Alkins v B & B Distribution Ltd. Magisterial Appeal No. 4 of 2015 delivered 23 July 2019**, at paras: [43] to [48] outlined the applicable law on Summary Dismissal and looked at the relevant authorities local and extra-regional. Of specific relevance to this analysis and discussion is the consideration of the kind of employee conduct which would amount to repudiation sufficient to justify summary dismissal [see para 45 and onward].

[34] This was an uncomplicated case determined simply by the magistrate determining which account she found credible; it turned simply on the

credibility of the parties and in the final analysis the magistrate accepted the account of the respondent.

[35] We endorse and adopt the approach taken by **Husbands J** as he then was in **Layson v Marshall Civil Appeal No. 45 of 1980** when that Court declined to interfere with the findings of fact by the court below and stated as follows:

> "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."

[36] Again this is seen in the approach of Lord Pearce in the House of Lords case of **Onassis and Calogeropoulos v Vergottis [1968] 2 Lloyd's Rep. 403 at 431** where he stated:

> "A trial judge has, except on rare occasions, a very great advantage over an appellate court: evidence of a witness heard and seen has a very great advantage over a transcript of that evidence: and a Court of Appeal should not interfere unless it is satisfied both that the judgment ought not to stand and that the divergence of views between the trial judge and the Court of Appeal has not been occasioned by any demeanour of the witness or truer atmosphere of the trial (which may have eluded the Court of Appeal) or by any other of those advantages which the trial judge undoubtedly possesses."

[37] Similarly, in this case there was adequate evidence upon which the magistrate could make a finding on the balance of probabilities. The decision of the magistrate was not against the weight of the evidence and having rested primarily on the credibility of the parties should not in the opinion of this

Court be disturbed. There was no discernible error in her determination of the principles of law applicable to the matter before her.

DISPOSAL

[38] The appeal is dismissed with costs to the respondent to be assessed if not, agreed.

Justice of Appeal (Ag.)

NARINE JA

[39] I have read the judgment of my sister Reifer. I agree with it and have nothing further to add.

Justice of Appeal

CHANDLER JA (Ag.)

[40] Before the court is a notice of appeal filed 4 May 2018, against the decision of her Worship Ms. Wanda Blair, Magistrate for the District "E" Holetown Magistrates court, made 11 April 2018, by virtue of which the appellant was ordered to pay to the respondent the sum of $3,807. 69 damages for wrongful dismissal together with costs of $305.00.

[41] The details of the findings of facts and holdings of law appealed against are:

i. the learned magistrate erred in law in finding that there were no complaints against the respondent during her 3 year period of employment and consequently that she was wrongfully dismissed; and

ii. the learned magistrate was wrong in law to ignore the independent evidence of the witness Marilyn Patrick (Ms. Patrick) and consequently came to the wrong decision.

[42] The grounds of appeal are:

"(a) The decision of the learned magistrate was against the weight of the evidence.

(b) The learned magistrate failed to attached sufficient weight or any weight to the evidence that the respondent failed to turn up to her work schedule on Thursday, 21 April 2016, thus creating a crisis and placing the appellant's husband in danger.

(c) There was a fundamental breach by the respondent of her Contract of Service and consequently there was a repudiation of her Contract of Service."

[43] The appellant seeks an order setting aside the magistrate's decision and an award of costs in this Court and in the Court below.

Brief Background

[44] The respondent was employed as an auxiliary nurse to attend to Mr. Malcolm Mapp (Mr. Mapp), the husband of the appellant, who was confined to bed at their Prior Park, St. James home (the residence) owing to a number of ailments including diabetes, Alzheimer's disease and hypertension.

[45] She was so employed from the month of June 2013 until 21 July 2016. On the latter date the respondent called the appellant around 7.30 pm and informed her that she would be late for work which was scheduled from 8.00 pm to 8.00 am. She stated that she would arrive at work between 8.30 and 9.00 pm. The appellant informed her that it was okay.

[46] The respondent alleged that she attended the residence about 8:45 pm; went to the front gate which was locked; rang the doorbell and no one answered. The appellant son's vehicle was parked outside. She remained there for about 5 to 10 mins and then returned home. She called the appellant's number but no one answered this was after 9 pm when she got home.

[47] The next day she called around 8:00 am and no one answered. She called the nurse who worked the morning shift and was instructed that Mr. Mapp was being taken to a nursing home. She told the nurse that no one spoke to her. She called the appellant after 8:00 am and got no response. She again called the nurse and went to the appellant's residence around midday on 22 July

2016, the gate was locked. She rang the doorbell and remained there for about 5 mins before going home. No one contacted her about her employment thereafter.

[48] The appellant's case was that the respondent never turned up for work on the night in question leading to a deterioration in Mr. Mapp's health. Nurse Patrick was summoned, attended to Mr. Mapp and, on her advice, he was relocated to a nursing home the following day.

The Magistrate's Findings

[49] The magistrate found that the respondent had been constructively dismissed by the appellant's act of placing Mr. Mapp in a nursing home. She accepted the evidence of the respondent that she had turned up for work on the night of 21 July 2016, the gate was locked so that she was unable to gain entry to the house and that she rang the doorbell. The respondent's evidence that, having not heard the appellant, she returned home and called the appellant and got no response was accepted in preference to that of the appellant and her son that the respondent never turned up for work. The further findings of the learned magistrate will be outlined in my analysis of the magistrate's decision and the evidence upon which that decision was based.

The appellant's submissions

[50] Mr. Clement Lashley QC, counsel for the appellant, submitted that the magistrate's reasoning was flawed. The respondent, he submitted never turned up for work that night, however, the magistrate found that she was locked out. He submitted that Ms. Marilyn Patrick (nurse Patrick), a nurse and a retired major in the Barbados Defence Force, who attended Mr. Mapp that night, gained entry to the house freely. In his opinion, therefore, the evidence of nurse Patrick, an independent witness, was more credible than that of the respondent.

[51] He submitted also that the respondent had committed a fundamental breach of contract and repudiated her contract of service by failing to turn up for work. Consequently, there was no constructive dismissal of the respondent by the appellant when Mr. Mapp was placed in a nursing home the next day on nurse Patrick's advice.

[52] Counsel further submitted that, as long as it could be shown that the respondent did not attend work on the 21 July 2016, she had fundamentally breached her contract. He relied upon **Pepper v Webb [1969] 2 All ER 216**.

[53] It was also Mr. Lashley QC's submission that the learned magistrate, having made the wrong inferences from the evidence before her, specifically with

reference to absenteeism, erred in law in coming to her conclusion that the respondent had been constructively dismissed.

The respondent's submissions

[54] Mr. Deighton Rawlins, counsel for the respondent, did not respond to Mr. Lashley's submissions and, in effect, left the decision to the court. In response to the Court's query as to whether one act of absenteeism could lead to a justified dismissal Mr. Rawlings responded that it would be a question of natural justice since the respondent ought to have had the right to respond to any attempt to dismiss her.

The appellate function

[55] Before embarking upon our excursus into the appeal itself, it is necessary to set out the nature of our function in this appeal. In **Glassesco Limited v St. Clair Greenidge, Magisterial Appeal No. 2 of 2012 (unreported) Mason JA** (as she then was) stated 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.**"

[56] **Mason JA** continued:

"[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."

The Law

[57] This matter falls to be decided according to the common law principles of wrongful dismissal. It is trite law that an employer may summarily dismiss an employee with just cause. Summary dismissal has been described as a strong measure, see: Laws v London Chronicle (indicator newspaper) Ltd. [1959] 1 WLR 698. It must be shown that the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service. In **Eudese Ramsay v St. James Beach Hotel Ltd Magisterial Appeal No. 4 of 1999, Simmons CJ** quoted the following dictum of Mc Cardie J approvingly in **In Re Rubel Bronze and Metal Co. and Vos [1918] 1 K.B. 315 at 322 (In Re Rubel Bronze)**:

> "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."

These principles are distilled in **Marcus Alkins v B & B Distribution Ltd (Magisterial Civil) Appeal No. 4 of 2015 (unreported)**.

[58] In **Addis v Gramophone Company Limited [1909] A.C. 488** the plaintiff had been employed by the defendant as their manager. He could have been dismissed with six months' notice. He was given six months' notice, however, the defendant, at the same time, appointed someone to succeed him and took steps to prevent him acting as manager any longer. It was held that he was wrongfully dismissed. Lord Loreburn LC noted that, it signified nothing, in the case before him, "...whether the claim is to be treated as for wrongful dismissal or not. In any case there was a breach of contract in not allowing the plaintiff to discharge his duties as manager..."

[59] In **In Re Rubel Bronze**, Mc Cardie J expressed the principles as follows:

> "It is clear, however, that if a dismissal be without just cause the master is deemed to have wrongfully repudiated his contractual obligations to the servant: see General Billposting Co. v. Atkinson. (4) "Wrongful dismissal" is, I think, a mere illustration of the general legal rule that an action will lie for unjustifiable repudiation of a contract. The doctrine of repudiation equally applies when the master wrongfully refuses, before the period of employment has arrived, to take the servant into his service: see Hochster v. De la Tour. (5).
> Now in the ordinary case of wrongful dismissal a master purports completely to terminate the contract. He refuses to accept further service. He wholly declines to pay further remuneration. The repudiation, as a rule, is undoubted, decisive, and complete. But if a claim for wrongful dismissal be founded on repudiation by the master, then I think that the general and recognized rules which apply in the case of ordinary contracts should apply also in the case of master and servant."

In this matter neither counsel quoted any legal authorities to the court in support of their legal contentions. There is also an absence of legal authority in the decision of the learned magistrate.

The Issues

[60] The issue before the court is whether we ought to overturn the decision of the learned magistrate. This spawns two sub-issues:

(1) whether the respondent was summarily dismissed and whether that dismissal was justified in law and,

(2) whether the facts as found by the learned magistrate were correct or whether she drew inferences which ought not to have been drawn or could not have been drawn from the facts as found.

[61] The question therefore is whether the magistrate's decision has been shown to be so erroneous that it ought to be overturned since it was based on irrelevant facts or inferences which could not possibly be drawn from the facts? The onus is on the appellant to do so on a balance of probabilities.

Discussion and Analysis

[62] It is uncontroverted that the respondent was contracted to look after Mr. Mapp and that she was contractually bound to do so on the night of 21 July 2016. In resolving the issue of whether or not the respondent had been wrongfully dismissed, the magistrate had to decide whether or not the respondent had

turned up for work on the night in question, as she alleged, in fulfilment of the terms of her contract or whether she had failed to do so, as alleged by the appellant and her son and was therefore in breach of her contract of employment.

[63] Whether or not the respondent turned up for work on 21 July 201 was a question of fact for the magistrate to be decided on the evidence before her. Whether or not she had been wrongfully dismissed was a question of law for the magistrate.

[64] Mr. Lashley QC has urged us to find that the magistrate was wrong to accept the respondent's testimony in preference to that of the appellant and her son. In other words, he asks us to reject the magistrate's findings that the respondent turned up for work, found the gate locked, rang the doorbell and, having got no response, left the residence. He therefore asks us to accept the appellant's contrasting evidence that the gate was not locked, the doorbell was working, she would have heard the doorbell it if it had been rung, it had not been rung and, therefore, the respondent did not turn up for work, thereby repudiating her contract of employment.

[65] The analysis of the evidence was principally a matter for the discretion of the learned magistrate. The learned magistrate had before her the evidence of the respondent, the appellant and the appellant's two witnesses, namely her son,

Malcolm Mapp Junior (Mr. Mapp Jnr) and nurse Patrick. She found that the respondent's evidence that she went to the residence and saw Mr. Mapp Jnr's car parked in the driveway was substantiated by the evidence of Mr. Mapp Jnr, who said he had parked his car in the drive way in front of the gate and not in the yard. The learned magistrate then asked herself "Had the plaintiff not been there how would she would have known where the vehicle was parked?" This was a legitimate question emanating from the facts.

[66] An analysis of the learned magistrate reasons for her decision demonstrate that she analysed the evidence of the parties to the case and the two witnesses at pages 16 and 17 of the reasons for decision. She clearly noted that Mr. Mapp Jnr denied that the gate was locked and corroborated his mother's evidence that nobody rang the doorbell.

[67] It appears to me that the findings of the learned magistrate were based upon her assessment of the evidence and the demeanor of the witnesses before her. On the issue of the credibility of the witnesses, she analysed the evidence in relation to whether or not the gate was open and resolved it in favour of the respondent.

[68] I am unable to see how this finding can be faulted.

[69] The learned magistrate then went on to infer that "Since the plaintiff was no stranger to the home, if the gate was open, there would have been no need for

her to stand outside pressing the bell when she knew how to gain access to the house." It is clear from this finding, that the learned Magistrate accepted the evidence of the respondent that she rang the doorbell and got no response. This was clearly a matter which depended upon the Magistrate's analysis of the credibility of the witnesses who she had seen and heard give their respective testimonies. Once again she accepted the respondent's evidence over that of the respondent.

[70] In the circumstances, I cannot accede to Mr. Lashley QC's submission that the learned Magistrate had erred in law when she did so.

[71] The learned magistrate drew the conclusion that "...the defendant was unhappy with the plaintiff being late and as a result she decided that she would seek help elsewhere. However, she was unable to do so as easily as she anticipated. By the time nurse Patrick had responded to the defendant's phone call, the defendant had made a number of calls without success. These calls were being made an hour after one nurse had left and the plaintiff was supposed to report for duty. However her inability to get another nurse resulted in her husband not receiving the necessary care and resulted in her agreeing to put him in a nursing home."

[72] The magistrate also analysed the evidence of Nurse Patrick that she attended to Mr. Mapp and, based on his condition, she advised the appellant to put him

in a nursing home. Nurse Patrick arrived at the house long after the respondent alleged that she had visited the premises and had rang the doorbell.

[73] I pause here to note that the evidence of Nurse Patrick could not shed any light on the principal issue as to whether or not the respondent turned up for work on the night in question. The learned magistrate, quite rightly, in my opinion, concluded that the resolution of the matter turned mainly on her assessment of the credibility of the plaintiff and the defendant and she proceeded to do so.

[74] In my opinion, the issue of whether or not the gate was locked is inextricably bound up in whether or not the respondent showed up for work.

[75] Having found that the respondent turned up at her workplace on the night in question, I now consider the issue as to whether or not the gate was locked when she arrived. The evidence of the two parties are diametrically opposed on this matter. The respondent gave evidence that when she got there "The gates were locked as always." The appellant's evidence in cross-examination, was "My gate was not locked when she turned up. It is not usually locked because my son comes in and he drives his vehicle right in." Mr. Mapp Jnr gave evidence that he parked his vehicle "right in front the gate which would not be locked." He said "I will walk through a small gate which is normally open and walk through the patio and go in." The evidence of Mr. Mapp Jnr is

sometimes in the nature of what normally occurred or evidence of the system and sometimes factual. The factual inexactitude of Mr. Mapp Jnr's evidence was a matter entirely for the magistrate to resolve having heard and seen the witnesses.

[76] I now analyse the evidence of Nurse Patrick. She said "I knew Mrs. Mapp's residence before then. When I arrived at Ms. Mapp's residence her door was open and her children were present… I parked outside of the gate. I accessed the residence through an open gate and open door." The evidence of Mr. Mapp Jnr is that there is a front gate and another or "small gate" which is normally open. Nurse Patrick did not specifically identify which gate she entered through. I also bear in mind that Mr. Mapp Jnr had already accessed the property prior to the arrival of Nurse Patrick and prior to the time when the respondent said that she arrived at the residence. In these circumstances, the evidence of Nurse Patrick by itself is not determinative of where the truth of the matter lay. Faced with conflicting testimony of the appellant and respondent, it was a matter for the trial Magistrate, who saw and heard the witnesses, to determine who was credible and who was not.

[77] Mr. Mapp Jnr's evidence that he parked outside the gate must be viewed in light of the appellant's evidence that the gate is left open so that Mr. Mapp Jnr's usually drives right in. No reason was given as to why he was parked

outside the gate. I remind myself that issues of credibility are primary for the primary tribunal which hears the evidence, observes the demeanor of the witnesses as they give that evidence and draws the conclusion as to whose evidence they accept and whose evidence they reject. In these circumstances, it was not unreasonable for the magistrate to draw the inference that the gate was locked as the respondent said.

[78] The learned magistrate found that the respondent's evidence that she turned up for work and no one answered to be more credible in light of the respondent's evidence that, at the time she arrived, Mr. Mapp Jnr's car was parked in front of the gate.

[79] I am unable to agree with Mr. Lashley QC's submission that there was no evidence upon which the learned magistrate could find that the respondent was more credible than the appellant.

[80] Having concluded that the respondent had indeed turned up for work, the learned magistrate then went on to ask herself, inferentially, why would the respondent not be able to gain access to the home contrary to the appellant's evidence that she was not denied entry, and opined as follows:

> "Since the plaintiff was no stranger to the home, if the gate was open, there would have been no need for her to stand

outside pressing the bell when she knew how to gain access to the house."

[81] The learned Magistrate went on to find also that the appellant was unhappy at being left alone with her husband. She concluded:

"The court's view is that the defendant was unhappy with the plaintiff being late. As a result she decided that she would seek help elsewhere. However she was unable to do so as easily as she anticipated. By the time nurse Patrick had responded to the defendant's phone call, the defendant had made a number of calls without success."

In my opinion the inferences drawn by the learned magistrate could reasonably have been inferred from the factual matrix outlined above and, accordingly, there is no merit in Mr. Lashley QC submissions.

[82] I now examine that finding. In her opinion, despite the fact that the respondent, who was acknowledged to have been a good worker, had been told by the appellant on 21 July that it was okay for her to be late, it had not been okay with the defendant since shortly thereafter she called her son and asked him to come over. She found also that, in the absence of evidence to the contrary, the nurse who was to be relieved by the respondent that evening could not

have been gone for too long so that any concern for Mr. Mapp 's health at that point could not have been as a result of the plaintiff being late.

[83] The learned magistrate then posed the following questions to herself, (1) "Did Mr. Mapp started [sic] not looking good as soon as the other nurse left or was it that Mrs. Mapp was upset that the plaintiff was late that in her eyes her husband was not looking good?" (2) "Why would the defendant be trying to reach the plaintiff shortly after she had told her it was okay for her to be late?"

[84] The respondent's evidence was that she called at about 7.30 pm to say she would arrive at work between 8.30 to 9.00 p.m. The appellant's evidence was that the respondent said she would arrive "...at 8 p.m. She never came."

[85] The appellant gave evidence that she called her son around 9 p.m. She told him that she was scared because she did not like the condition her husband was in. The appellant's evidence was also that "...my husband had to be placed in a nursing home because around 11 p.m. when I got a nurse to come see him he was sweating profusely and he was lifeless."

[86] Mr. Mapp Jnr gave evidence that he received a call from his mother between 7-8 pm. She told him that the nurse had not come in, she had said she would be an hour late. "She was rostered to come at 7 pm. She asked if I could come over and stay with her as she was the only person with my dad. I would get to her at 2 minutes driving. I went over." Mr. Mapp Jnr never gave evidence that

his mother said that she was scared because she did not like the condition Mr. Mapp was in as his mother had testified.

[87] His evidence is also that, when he arrived at the residence, his mother opened the door and told him to go and look at his dad. He gave no evidence about his observations of his father's condition at that time. His further evidence is that the appellant called nurse Patrick who eventually came and checked Mr. Mapp's blood sugar which was 2.6 which was very low. The appellant's evidence was that the blood sugar was 3.6 ml and nurse Patrick's evidence was that it was 3.0.

[88] Whilst Mr. Mapp Jnr did not say at what time he left to go to his parents' house, he gave evidence that he got there between 7 and 8 pm. His mother said that she "…was trying to reach Donna and she could not reach her." There is an obvious issue regarding the time at which the respondent was to report for duty. What is uncontroverted is that she was given permission to be late.

[89] The learned magistrate found that the calls were being made an hour after one nurse had left and the respondent was supposed to report for duty. She also found that the appellant's inability to get another nurse resulted in her husband not receiving the necessary care which resulted in the appellant agreeing to put Mr. Mapp in a nursing home.

[90] I pause here to observe that the issue of the deterioration in Mr. Mapp's health is relevant only if there had been a finding that the respondent had failed to turn up for work. The reason is that, by agreeing that the respondent could be late for her shift, the appellant had undertaken the risk that something could occur during the period of her lateness.

[91] Mr. Lashley QC, posited his submissions on the fact that the respondent absented herself from work on the night in question thus leading to the deterioration of the appellant's husband's health. This is clearly at odds with the magistrate's finding. The onus is on the respondent to establish that submission and she failed to do so. I am unable to find that the magistrate's finding was wrong.

[92] With reference to the submission that the learned magistrate erred in law in finding that there were no complaints against the Respondent during her 3 year period of employment and therefore she was wrongfully dismissed, the evidence of the appellant, in cross-examination is that the respondent attended to Mr. Mapp well. There is no evidence by the appellant or Mr. Mapp Jnr of any complaints against the respondent during the three years of her employment.

[93] Accordingly, I find no merit in this ground.

[94] The respondent gave evidence that she called to enquire about her work the following day around 8.00 pm. She was rostered for 8.00 pm. She gave evidence that she called the nurse who was on duty the next day on the cell phone after she got no response from the appellant and was told that Mr. Mapp was being taken to a nursing home. She also gave evidence that she visited the home the next day around midday and the gate was locked, she rang the bell. There was no car. She remained for about 5 minutes and left. Mr. Mapp Jnr's evidence is that he visited the appellant the next day "around 6 a.m., just before the ambulance left." The evidence of the respondent is consistent with her contractual obligation to turn up for work since she had not been officially notified that her services were no longer required.

Absenteeism

[95] The learned magistrate considered Mr. Lashley QC's submission that the respondent did not turn up for work. She stated that "An employee's absence from work does not automatically entitles [sic] him or her to be dismissed. Even if the Court accepts the Defendant's evidence that the Plaintiff did not report for duty, that does not entitle her to dismiss the Plaintiff without giving her an opportunity to explain her absence." She went on to discuss the employment history of the respondent and the fact that no evidence was led with respect to absenteeism, lateness or that the respondent was a bad worker.

She also took into account the appellant's evidence that the respondent tended to Mr. Mapp well and opined:

> "While the Court accepts that the Defendant would have suffered some anxiety and inconvenience if she had to find another nurse if the Plaintiff had not turned up, the Court is of the view that that was not sufficient to constructively dismiss the Plaintiff."

[96] This is the reasoning which Mr. Lashley QC submits was flawed. However, the learned magistrate went on to state that "The Court accepts the evidence of the Plaintiff that she did turn up for work and was denied access to the Defendant's residence." Having regard to our conclusions on the primary issue that the learned magistrate's decision cannot be impugned, it is unnecessary to discuss the issue of absenteeism.

Conclusion

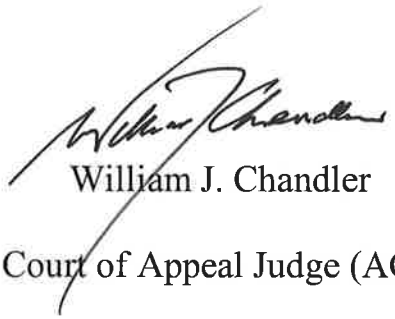
[97] In the circumstances, I am of the view and hold that neither the magistrate's findings of fact nor the inferences drawn therefrom can be faulted. I am further of the opinion that the respondent's conduct was consistent with the terms of her contract of service and the allowance made for her lateness on the 21 July 2016. I am also of the view that the appellant's act of removing Mr. Mapp to a nursing home rendered it impossible for the respondent to fulfill the terms

of her contract and amounted to a repudiation of the said contract. Accordingly, the respondent was wrongfully dismissed.

[98] There has been no challenge to the quantum of damages.

Disposal

[99] It is for these reasons that I concurred in the order of 4 December 2019 dismissing the appeal and ordering that the appellant shall pay the respondent's costs of the appeal to be assessed if not agreed.



William J. Chandler

Court of Appeal Judge (AG.)