In The Supreme Court of Bermuda

CIVIL JURISDICTION

2017 No: 71

BETWEEN:

V.I.P AUTO SERVICE LTD

Appellant

And

SONJA WARNER

Respondent

EX TEMPORE JUDGMENT

Appeal against decision of Employment Tribunal (RSC O.55)
Whether Tribunal ought to have considered and found evidence of Summary Dismissal
Whether Employee's part in heated exchange with Employer amounted to a Resignation

Date of Hearings: Thursday 7 June 2018
Date of Judgment: Thursday 7 June 2018
Date of Reasons: Monday 11 June 2018

Appellant Mr. Jaymo Durham (Amicus Law Chambers Ltd.)
Respondent Mr. Peter Sanderson (Benedek Lewin Limited)

JUDGMENT of Shade Subair Williams A/J

Introductory

1. This is an appeal made under RSC Order 55 against the findings and decision of the Employment Tribunal ("the Tribunal") in favour of the Respondent employee. Aggrieved by

the determination and orders made by the Tribunal, the Appellant filed a Notice of Appeal in the Supreme Court on 28 November 2017 pursuant to section 41 of the Employment Act 2000 ("the 2000 Act").

2. I dismissed the appeal at the conclusion of the hearing and indicated that I would provide these written reasons.

The Grounds of Appeal

3. The grounds of appeal were pleaded in the following way:

   1. *Part of the Order complained of.*
      The Appellant appeals from the whole decision
   2. *Grounds of Appeal*
      1) *The Employment Tribunal erred in law in that they failed to consider that they were open to find that the dismissal was a summary dismissal based on the employer's conduct*
      2) *The Employment Tribunal erred in law in that they failed to properly consider whether the employer acted reasonably in dismissing the employee, given the circumstances of the case as required by s. 25 of the Act.*
      3) *That the finding that "the Tribunal accepts that there are many reasons that the employer could have dismissed the Employee; however, the Employer has not proven the case for dismissal based on a "verbal resignation"" was perverse.*

Summary of the Evidence and Decision by the Tribunal

4. The evidence before the Tribunal is noted in detail in an un-paginated Appeal Record filed by the Tribunal. In summary the Appellant employers, Mr. Keith Richardson and his wife Mrs. Angelista Richardson both held upper-management or supervisory type positions at VIP Auto Service Ltd. where the Respondent, Sonja Warner, was hired as Office Manager. With the passage of time, Ms. Warner and Mrs. Richardson's work relationship deteriorated and became confrontational.

5. It was uncontroversial evidence that a heated exchanged occurred between the two women on 2 March 2017. Evidence admitted before the Tribunal on behalf of Ms. Warner suggests that the confrontation was even physical at a common-assault threshold. The dispute ended with Ms. Warner uttering words to the effect; "I'm leaving" which was contentiously taken and treated by the Employers as a resignation. On the following two work days, a Friday and Monday, Ms. Warner did not attend work, having advised her employers that she was taking a mental health day and attending a funeral. When she returned to work on the

Tuesday, she encountered the ensuing conflict over whether she had effectively resigned. Ms. Warner's employers, by letter dated 2 March 2017, purported to accept a resignation from her and terminated her employment.

6. At the Tribunal hearing, only Mrs. Richardson gave evidence on behalf of the Employer. A part-time employee of the Appellant, one Ms. Latonie Frias, gave evidence in support of Ms. Warner's case. No complaint was made during the hearing of the appeal before me in challenge of the sufficiency or accuracy of the facts as summarized by the Tribunal in its written decision at paragraphs 1-13:

Background

1. *The Employee was hired by the Employer in February 2010 until March 2, 2017 where she held the position of Officer Manager.*
2. *During the early years of the tenure, the relationship between the Employer and the Employee appeared to be cordial and beneficial to both parties.*
3. *In 2013, the Employer and the Employee developed serious differences due to "how badly mismanaged (the finances of the company) were."*
4. *The Employee, when confronted with evidence that she had not performed the duties efficiently, apologized for any managerial lapses and the Employer gave her a second chance.*
5. *In the same year, 2013, the Employer brought his wife on board to assist in the business.*
6. *From that point on, the Company appeared to be operating properly and the Employer seemed to be satisfied with the Employee's performance.*
7. *However, over time, the interaction between the Employer's wife and the Employee appears to have become increasingly strained and confrontational.*
8. *On Thursday, March 2nd, 2017, an incident occurred between the Employee and the Employer's wife when words were uttered by the Employee, which were interpreted by the Employer's wife as a verbal resignation.*
9. *The alleged words were, "I'm leaving" or words to that effect.*
10. *The Employee left the premises and in a "WhatsApp" communication with another Employee at the office, informed her of the altercation and that she was taking two days off: for a mental health day and to attend a funeral, and would return to work on Tuesday.*
11. *The Employee further alleged that she called the Employer to apprise him of the situation.*
12. *On Tuesday, March 7th, 2017, the Employee returned to work at which time the Employer handed her a letter of termination, accepting her resignation. She refused to accept it denying that she had resigned and continued working when the Employer left the office.*

13. On the same day, Tuesday, 7th March 2017 when the Employer returned to the office and found that the Employee had not left, he ordered her off the premises.

7. The Tribunal stated its decision at paragraphs 38-40 as follows:
   38. Taking all of the facts into consideration, the Tribunal rules that the Employer failed to prove that the Employee resigned and must, therefore, rule that she was dismissed unfairly.
   39. In making the determination for compensation, the Tribunal is guided by section 40 (4b) of the Employment act 2000.
   40. Considering the amount of the Award, it is the Order of this Tribunal that the Employee is entitled to the following only:
   (i) Twenty-four (24) weeks wages- less statutory deductions; and
   (ii) Amount to be paid no later than January 31st, 2018
   The Parties to this hearing have been advised and accepted that the Determination and Order of the Tribunal are final. Any aggrieved party may appeal to the Supreme Court ***only on a point of law****.*

Dismissal of Grounds which did not raise Points of Law

8. I dismissed Grounds 1 and 2(2) because the issues raised did not involve points of law. Section 41(1) of the Employment Act 2000 provides; '*A party aggrieved by a determination or order of the Tribunal may appeal to the Supreme Court on a point of law*.'

9. I considered Ground 2(3) qualified as a question of law. With trepidation, I also treated Ground 2(1) as a pleading on a point of law.

10. Considering the possibility that I erred in treating any of the grounds as purely or mixed factual complaints, I considered all grounds substantively and found that they were each without merit in any event.

Reasons for Dismissal of Grounds Considered Substantively.

Ground 1

11. In dealing with Ground 1 which challenged the Tribunal's decision as a whole, Mr. Durham referred this Court to a persuasive decision out of the UK Employment Appeal Tribunal where the President, Mr. Justice Wood MC delivered a judgment in *Kwik-Fit (GB) Ltd v G Lineham [1991] UKEAT 250_91_2410*. The opening paragraph of that decision succinctly sets the scene:

    "*By an Originating Application dated the 25th October 1990 Mr. Lineham alleged that he had been unfairly dismissed by his employers Kwik-Fit (GB) Ltd (Kwik-Fit). His case was*

heard on the 8th March 1991 by an Industrial Tribunal at Ashford who unanimously decided that on the primary facts he had resigned and therefore had not been dismissed, but that nevertheless in law he had been dismissed because his employers had not sought to discover the reality of a very heated incident when under a duty so to do and that the dismissal was unfair. It was also found that he had contributed towards his dismissal to the extent of 25%. Kwit-Fit appeal."

12. On the facts of that case, the employee, Mr. Lineham, was in a managerial role and on occasion performed over-time tasks without additional remuneration, despite having so requested. The Kwik-Fit employer on one occasion, bypassing the verbal warning procedure, issued a written warning to Mr. Lineham on the heels of an incident giving rise to a minor late night security breach. Notably, the original Tribunal found that the incident did not give rise to a breach and so it did not warrant any warning to the employee.

13. Notwithstanding, the issuance of the warning developed into a heated exchange wherein the Kwik-Fit employer asked Mr. Lineham; "*If you feel this way why do you work for Kwik-Fit?*" The employee, without verbal reply, then threw his keys on the counter and left the work place only to return momentarily to collect his mobile phone before leaving again without return. The Employers, in contacting Personnel on the same day of the confrontation said; "*… the necessary form should read "walked out. Do not re-employ. Stop bonus"*" Subsequent dialogue between the parties was by telephone during which time Mr. Lineham informed his employer that he would file his complaint with the Employment Tribunal.

14. The decision of the original tribunal was recited in the learned President's judgment at the final paragraph on page 4:

"*Now we look to the law. The leading case is that of Southern v Frank Charlesly [1981] IRLR 278. The law seems to be this. Where an employee gives an unequivocal and unambiguous notice of his resignation, then that can be accepted by an employer and there is no dismissal. Where the ambiguous words are said in a moment of anger or in the heat of the moment or where there is mental capacity on the part of the employee or a disability of some kind, there is a duty on the employer not to accept such a resignation to readily, but to check clearly that it is the true intention of the employee and to inquire when matters are clearer and calmer. Put another way, it important for an employer to know whether an employee has resigned, since if he treats the employee as having resigned and that is not the case, he may be taken to have dismissed the employee. So in any case where a resignation has taken place or indeed a dismissal has taken place in an angry moment, or in other circumstances to which we have referred, there is an onus on the employer to check that it is the continuing and true intention of the employee. In other words, the employee should seek to recoup the situation and see if the resignation has occurred in these circumstances. We find unanimously that the employers have not done that, that they rather seized the opportunity of this resignation when it arose to make sure that the applicant should not return, indeed that was a fact endorsed on the Reason for Leaving form which they filled in. So we find that there was a dismissal because the employer did insufficient to recoup the*

situation and write or speak to the applicant to find out what his true intentions really were…"

15. The employer appealed to the Appeal Tribunal on the basis that the original tribunal erred in law in finding that there was an "onus" or duty" on an employer to seek to recoup a situation and to investigate the true intention of an employee in circumstances involving anger or a heated exchange, citing *Gale Ltd v Gilbert [1978] ICR 1149* where Arnold J sitting in the Appeal Tribunal had previously ruled that an employer was entitled to accept the employee's heated departure as a resignation. In referring to the Appeal Tribunal's decision in *Gale*, Wood P observed on page 5; "*This Court allowing the appeal, decided that although it was undesirable for an employer to accept a resignation of (a) long serving employee without giving him a chance to consider his decision nevertheless where the words were clear and unambiguous the employer was entitled to accept the resignation...*" Two categories of cases were then listed to distinguish between cases where the conduct or utterances were ambiguous and those where it was clear.

16. At pages 7-8 of his judgment in *Kwik-Fit* Wood P said;

"*How then is that approach to be reconciled in law? This is not a purely commercial context. In the sphere of industrial relations these special circumstances may arise due to those conflicts of personalities or individual characteristics. A resignation by an employee is a repudiation of the contract of employment, a fundamental breach. It should be accepted by the employer within a reasonable time see Western Excavation (EEC) Ltd v Sharp [1978] ICR 22. CA, per Lord Denning at page 226B; see also London Transport Executive v Clarke [1981] ICR 355. In many cases the acceptance will be by inference. Thus where the words or actions are prima facie unambiguous an employer is entitled to accept the repudiation at its face value at once, unless these special circumstances exist, in which case he should allow a reasonable time to elapse during which facts may arise which case doubt upon that prima facie interpretation of the unambiguous words or action. If he does not investigate these facts, a Tribunal may hold him disentitled to assume that the words or actions did amount to a resignation, although to paraphrase the words of May LJ- Tribunals should not be astute so to find.*

One then asks what is that reasonable period of time? It may be very short- Martin. It may be over a week-end- Barclay. The test is objective and one of reasonableness. It is only likely to be a relatively short, a day or two, and it will almost certainly be the conduct of the employee which becomes relevant, but necessarily so."

17. Mr. Durham also referred to the judgment of Bell J (as he then was) in *Simons v Darrell and Darrell [2008] Bda L.R. 33* which I found of minimal assistance as that case turned own its own facts.

18. The evidence of Ms. Warner's alleged resignation is ambiguous and does not fall in the category of clear wording or action which could properly and lawfully be construed by an employer as a resignation without further investigation. In fact, far from it. Ms Warner was obviously reacting to a heated exchange between her and Mrs. Richardson which was

undoubtedly a most upsetting incident. Ms. Warner expressly conveyed that she would be taking a mental health day and a grievance day- not terminating her employment contract. The evidence did not adequately establish that her decision to take two days of (unapproved) leave amounted to a resignation. Moreover, given the tumultuous circumstances, I did not see how the evidence, taken at its highest, could have established grave or serious misconduct. If the Employer wanted to demonstrate serious misconduct at the Tribunal hearing, it should have presented its case accordingly. The details of the confrontation should have been put to Ms. Warner and she should have also been given the opportunity to answer to any allegations that her two-day absence constituted serious misconduct. In my judgment Ground 1 failed both on merit and on Mr. Sanderson's broader complaint that it was not a pleading on a point a law.

Grounds 2(1) and 2(2)

19. Mr. Durham, on behalf of the Appellant, complained that the Tribunal prematurely drew an end to their analysis of the employment termination having found that the evidence did not support a resignation. Counsel further argued that, as a matter of law, it was incumbent on the Tribunal extend its analysis to the alternative position: whether or not the termination of employment was in fact a summary dismissal reasonably made by the Employers in accordance with section 25 of the 2000 Act.

20. Mr. Durham referred the Court to the English Court of Appeal decision delivered by Mummery J in *Dr. Ryta Kuzel v Roche Products Limited [2008] EWCA Civ 380*. The introductory paragraph provides: "*Dr. Kuzel claims that she was unfairly dismissed by Roche Products Limited (Roche). The reason for her dismissal is contested. In the Employment Tribunal (ET) Roche argued that there was a potentially fair reason, either a conduct reason or "some other substantial reason". Roche failed and was held liable for "ordinary" unfair dismissal. It was ordered to pay compensation capped at the then maximum of £56,800*."

21. The issue before the Court of Appeal was, inter alia, whether the ET erred in holding that Dr. Kuzel was dismissed for a reason that neither party advanced. Mr Durham placed emphasis on the following helpful recital from Mummery J commencing at the paragraph 58:

"*58. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.*
59. The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it

was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.
60. As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason.

22. It was suggestive throughout Mr. Durham's submissions that this Ground of Appeal ought to succeed once this Court determines that procedurally, the Tribunal ought to have addressed its mind to whether there was a sufficient evidential basis for a summary dismissal. Mr. Durham seemingly discouraged this Court from making an assessment as to whether the evidence was capable of establishing a summary dismissal in any event. I rejected such a notion on the basis that the Court is duty-bound to consider whether the Tribunal's alleged shortfall rendered its findings unsafe or reliable. It would defeat the overriding objective of this Court to remit the matter to the Tribunal when the underlying evidence of a lawful summary dismissal, relevant to its alternative assessment was so obviously weak.

23. On this issue, I had regard to the judicial remarks made by the then President, Morison J, of the English Employment Appeal Tribunal in *Chief Constable of Thames Valley Police v Kellaway [2006] IRLR 170* This passage was recited by the learned Hon. Chief Justice, Ian Kawaley, in *Matthews v Bank of Bermuda Ltd [2010] Bda L.R. 56 at paragraph to 57*:

"*Whilst we would not condone a tribunal decision which does not set out the relevant legal position and does not make findings of fact an all the principal submissions made, this does not amount to an automatic ground of appeal. It has to be shown that omitting to set out the legal principles or key submissions made has led to a consequent error of law or incorrect finding of fact*."

24. For these reasons, I found it necessary to assess the evidence to determine whether there was a factual basis upon which the Tribunal may have reasonably and properly found a lawful summary dismissal.

25. I had regard to section 25 of the 2000 Act which sets out the statutory framework for summary dismissals:

"*Summary dismissal for serious misconduct*
25 An employer is entitled to dismiss without notice or payment of any severance allowance an employee who is guilty of serious misconduct-
(a) which is directly related to the employment relationship; or
(b) which has a detrimental effect on the employer's business,
such that it would be unreasonable to expect the employer to continue the employment relationship."

26. Section 26 sets out the requisite procedural steps for establishing repeated misconduct:

"*Termination for repeated misconduct*
26 (1) Where an employee is guilty of misconduct which is directly related to the employment relationship but which does not fall within section 25, the employer may give him a written warning.
(2) If, within six months of the date of the warning, the employee is again guilty of misconduct falling within subsection (1), the employer may terminate the employee's contract of employment without notice or the payment of the severance allowance.
(3) An employer shall be deemed to have waived his right to terminate under subsection (2) if he does not do so within a reasonable period of time after having knowledge of the repeated misconduct.

27. The evidence clearly fell short of proving repeated misconduct. More so, there was no evidence before the Tribunal from which it could be reasonably determined that the s. 26 warning procedure had been followed. This only remaining alternative would have been a s. 25 summary dismissal by way of challenge to the Tribunal's finding of unfair dismissal.

28. In my judgment, the evidence woefully failed to establish serious misconduct. On the evidence led, there was a confrontation between Ms. Warner and Mrs. Richardson but the Tribunal did not hear evidence detailing the subject of that confrontation or how it unfolded. It would be grossly speculative to rely on the fact of the confrontation to conclude that Ms. Warner's had committed serious misconduct by failing to remain at the work place for the remainder of the Thursday and failing to attend on work on the Friday and following Monday. The fact that she took a portion of this time as a mental health day immediately following the confrontation establishes that her behavior was reactionary. Indeed, she expressly complained that she had been physically handled by Mrs. Richardson.

29. Mr. Durham argued that Mrs. Warner's refusal to attend a Saturday meeting compounded her misconduct. I accepted Mr. Sanderson's submission that there was no evidence before the Tribunal that could be reasonably taken to suggest that Ms. Warner had any contractual duty to attend or carry out her employment duties on a Saturday.

30. For all of these reasons, I found that the requisite evidential basis for a finding of serious misconduct was most lacking in this case. It was, therefore, not open on the facts for the Tribunal to find that the Employer reasonably dismissed the Employee in this case for serious or grave misconduct. Grounds 2(1) and 2(2) necessarily failed.

Ground 2(3)

31. The Appellant's Ground 2(3) targeted the Tribunal's finding at paragraph 37 of its decision as a perverse finding. This portion of the decision reads as follows:

    "*37. The Tribunal accepts that there are many reasons that the Employer could have dismissed the Employee; however, the Employer has not proven the case for dismissal based on a "verbal resignation*."

32. I find that the wording of paragraph 37 is ambiguous and is capable of being reasonably construed in ways which result in different meanings. I do not find that the literal interpretation of *"The Tribunal accepts that there are many reasons that the Employer could have dismissed the Employee…"* means that the Tribunal found on the evidence that other grounds for a dismissal were proven. The more persuasive construction, as I see it, would be that the Tribunal was merely acknowledging that there were other possible grounds which may have been advanced upon which the Employer could have dismissed the Employee. For these reasons, I dismissed this ground of appeal.

Conclusion

33. The appeal is dismissed on all grounds.

34. Costs for the Respondent on a standard basis to be taxed if not agreed.

35. The award decided by the Tribunal is affirmed and the statutory stay imposed by section 41 of the Employment Act 2000 is lifted.

Dated this 11th day of June 2018

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SHADE SUBAIR WILLIAMS
ACTING PUISNE JUDGE OF THE SUPREME COURT