

BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

MAGISTERIAL CIVIL APPEAL NO.1 OF 2004

BETWEEN:

PHILLIP JAMES

Appellant

and

ROAD TOWN WHOLESALE (TRADING) LTD.

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC
The Hon. Mr. Michael Gordon, QC
The Hon. Mr. Denys Barrow, SC

Chief Justice [Ag.]
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Ms. Melanie Williams for the Appellant
Ms. Hazel-Ann Hannaway for the Respondent

2005: April 25;
June 27.

JUDGMENT

- [1] **ALLEYNE, C.J. [AG.]:** This is an appeal against the judgment of a Magistrate in a claim for damages for wrongful dismissal. The Appellant Phillip James claimed against the Respondent for loss of salary: \$5,400.00; travel allowance: \$900.00; and, bonus: \$300.00. The learned Magistrate dismissed the claim and awarded the Respondent costs in the sum of \$800.00.
- [2] The Appellant Phillip James, who claims to be a professional bartender and accountant, was employed by the Respondent Company as a beverage sales representative. Samuel Tucker was the beverage sales and marketing manager of the company, and as such was Mr. James' supervisor.

- [3] On 27th September 2001 Mr. Tucker called Mr. James into his office to speak with him on a work-related matter. An argument developed over Mr. James' perceived refusal to follow instructions. Mr. Tucker handed Mr. James a letter, which Mr. James says Mr. Tucker described as 'your third warning letter'. Mr. James admitted that he ripped the letter apart. Mr. Tucker said that Mr. James began punching him (Mr. Tucker) in the face while Mr. Tucker was sitting in his chair. Mr. James continued to hit Mr. Tucker until another sales representative entered the office and took Mr. James away. According to a medical examination form admitted into evidence Mr. Tucker sustained swelling and abrasion of the nose.
- [4] Mr. James' version of events is that Mr. Tucker first struck him when he tore the letter, and he retaliated in self-defence. He said he punched Mr. Tucker in self-defence and then he and Mr. Tucker began to fight.
- [5] This incident was witnessed by another employee of the company, Venice Connie Harry, who gave evidence at the trial. Her evidence largely corroborated the evidence of Mr. Tucker. She said that following the incident Mr. Tucker's nose was bleeding and he was given a napkin to stanch the bleeding.
- [6] On the same day the Sales and Marketing Manager of the Respondent company, Mr. Berkley, spoke with Carlene Penn, the company's Human Resources Manager, as a result of which she called the senior managers of the company and a decision was taken to have a meeting the following day on the matter. Mr. James was invited to and did attend that meeting. Ms. Penn's evidence is that Mr. James was asked at the meeting what had happened. He gave no answer. Ms. Penn's evidence is that at the meeting Mr. James did not say anything. At the end of the meeting, Ms. Penn said, she handed Mr. James a letter of dismissal that had been prepared and was dated the previous day, 27th September 2001. The letter, in Ms. Penn's words, 'stated that due to the assault on Mr. Tucker your manager your employment with Riteway is hereby terminated.' The letter

contained any compensation due to him, according to Ms. Penn's evidence, and also demanded that he return all his employer's property.

- [7] The letter under reference was admitted into evidence, and I quote the text thereof in its entirety:

"Due to the assault by you today on Mr. Samuel Tucker, your manager, which resulted in his seeking medical attention and the involvement of the Royal Virgin Islands Police Force, your employment with Roadtown Wholesale is hereby terminated.
Please return all of Roadtown Wholesale's property.
We do wish you success in your future endeavours."

- [8] In cross-examination Ms. Penn said that they did not have a 'sit-down' meeting on the 27th, she spoke to the manager and they decided to have a meeting the next day. She went on:

"The letter was prepared because we have a policy that either fighting or theft will result in immediate termination. In keeping with the policy I prepared the letter. The letter is dated 27th. However it was not given to him on the 27th. This letter was to take effect as soon as he got it in his hand."

- [9] Ms. Penn explained the procedure adopted for investigating fights at the workplace and asserted that that procedure was in keeping with the grievance procedure in the company's handbook. She admitted that she had been told that Mr. James was met by a security guard on his arrival at work on the 28th, and was prevented from entering the work place. She denied that Mr. James was not given a fair hearing and that the company had taken the decision the day before to terminate his employment. She denied that the meeting of 28th was 'just a formality to meet the procedures in (the) handbook.'

- [10] Mr. James said that at the meeting nothing was said of importance. He said that 'they' did not ask about what had happened the day before. He claimed that 'they' were just beating around the bush like they want me to say something. I sharply told them that I have a case in Court so I am not going to discuss the matter.'

- [11] The learned Magistrate, in his reasons for decision, made it clear that he believed the Respondent's version of the events of 27th September, and specifically that he did not believe the evidence of Mr. James that he acted in self-defence.
- [12] The learned Magistrate in his reasons for decision said: 'I cannot see how a summary dismissal can be wrongful where an employee physically attacks his supervisor in the course of his employment.' Further, the learned Magistrate held that the circumstances of this case fall within section C58(1) of the Labour Code CAP. 293 of the Laws of the Virgin Islands Revised Edition 1991, which permits the termination of employment where the employee has been guilty of misconduct in or in relation to his employment so serious that the employer cannot reasonably be expected to take any course other than termination.
- [13] I do not think that there is any dispute that the conduct complained of, if proved, would justify summary dismissal. What the Respondent argues in support of the appeal is that 'a proper investigation was required.' He claims that this was not done and therefore the dismissal was wrongful.
- [14] In her written submissions learned Counsel for the Appellant argued that all the circumstances should have been examined by the Respondent to determine if the sanction of summary dismissal was justified. Learned Counsel relied on the case of **Bico Ltd. v Jones**¹, a case from the Court of Appeal of Barbados, in support of the proposition that a proper investigation was required into the sufficiency of the offence to justify immediate dismissal.
- [15] The learned Chief Justice of Barbados referred² to the opinion of the Privy Council in **Clouston & Co. Ltd. v Corry**³ in which Lord James held that the sufficiency of the justification depended upon the extent of misconduct. His Lordship held that

¹ [1996] 53 WIR 49.

² *Ibid.* at page 53.

³ [1906] AC 122 at 129.

'the question whether the misconduct proved establishes the right to dismiss the servant must depend upon facts – and is a question of fact.'

[16] In the case before us the Respondent was aware of the allegation of an unprovoked assault by the Appellant upon his supervisor, in the office of the supervisor, during working hours, leading to moderately serious injury to the supervisor. This fact is clearly established by the contents of the letter dated September 27th 2001. The Appellant was given an opportunity to put his side of the story and to exculpate himself or to justify his conduct. He declined to say anything, as he himself deposed in cross-examination. The learned Magistrate found as a fact that the misconduct of the Appellant was 'of the highest order and (he) acted in clear violation of the code of conduct' of the establishment. She found as a fact that summary dismissal was justified in the circumstances. I can find no reason to disagree with the learned Magistrates opinion in that regard. I would therefore dismiss the appeal with costs to the Respondent of \$1,000.00.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Michael Gordon, QC
Justice of Appeal

I concur.

Denys Barrow, SC
Justice of Appeal [Ag.]