

MONTSERRAT

IN THE COURT OF APPEAL

CIVIL APPEAL NO. TI of 1992

BETWEEN:

JOHN RYAN

- Appellant

and

OLGA LINDSEY

- Respondent

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice
The Honourable Mr. C.M. Dennis Byron - Justice of Appeal
The Honourable Dr. Nicholas J.O. Liverpool - Justice of Appeal

Appearances: Mr. K. Allen for the appellant
Mr. J.S. Barzey for the respondent

1993: April 29,
October 11.

JUDGMENT

SIR VINCENT FLOISSAC, C.J.

The respondent was in the employment of the appellant for more than 5 years. She was then summarily dismissed. She accordingly referred her dismissal to the Labour Tribunal established under section 36(1) of the Employment Ordinance No. 19 of 1979 (the Ordinance) of Montserrat.

In a decision given on the 26th June 1992, the Tribunal stated as follows:

" The Tribunal having heard and examined the evidence adduced by the applicant and the defendant and the witnesses called on their behalf found the following facts: 1. The applicant was employed by the defendant continuously from the 25th day of September 1985 to the 26th day of October 1990. 2. The applicant during the course of her employment received a salary of \$224.20 per week. 3. The applicant was employed by the defendant as a cashier and was required also to pack goods on the shelves of the store from time to time. 4. The applicant was warned on several occasions during the year 1990

about the standard of her work and her lack of discipline.

5. The applicant was suspended on the 27th day of August 1990 for a period of two weeks as a result of her lack of discipline. 6. On September 10, 1990 the applicant apologised to the employer. 7. On resumption of her duty after the period of suspension the applicant was given the task of store floor assistant which included packing of freezers and chillers and also performed the duties of cashier occasionally. 8. On the 26th October, 1990 the defendant instructed the applicant to rearrange a chest freezer in the shop. 9. The applicant failed to carry out this instruction which was within the terms of her employment. 10. The applicant spoke to her father, Mr. Ronald White, in the presence and hearing of the defendant in the shop about the instruction given by the defendant and Mr. White in the presence and hearing of the defendant said "People like he want somebody burst his fucking head." 11. The defendant spoke to Mr. White in the presence of the applicant about the applicant's attitude towards work and informed the applicant that she was dismissed and that she should return the following day to collect her letter of dismissal. 12. The letter of dismissal was given to the applicant on the 27th day of October 1990. 13. The applicant was dismissed summarily. 14. The reasons for dismissal were the applicant's failure to perform duties assigned to her and her behaviour in the presence of her employer on the 26th October 1990."

The Tribunal concluded as follows:

"Section 12 of the Employment Ordinance No. 19 of 1979 sets out the reasons for dismissal which will not give rise to compensation. While Section 14 of the said Ordinance places the burden on the defendant to show that the reason for dismissal was one of these allowed by subsection 2 of section 12 of the Ordinance.

The Tribunal is of the view that the defendant has

discharged this burden. The Tribunal is of the opinion that having regard to all relevant circumstances the facts found by the Tribunal it was unreasonable for the employer to continue the employer-employee relation. However, the Tribunal is of the view that the circumstances were not such as to warrant summary dismissal.

Section 10 of the Employment Ordinance sets out the minimum notice required to be given by an employer to an employee to terminate the contract of employment. The applicant having been employed by the defendant from September 1985 to October 1990, a period of five (5) years and one (1) month, in accordance with the provisions of Section 10(1)(c) the applicant was entitled to four(4) weeks notice. The Tribunal will award the sum of four (4) weeks pay to the applicant, i.e. a sum of \$896.80."

The appellant is dissatisfied with the Tribunal's decision and has appealed against it by way of case stated as provided by section 40 of the Ordinance. The questions posed are: "(1) Whether or not an award of payment in lieu of notice is consistent with the findings of fact by the Tribunal. (2) Whether the findings of facts by the Tribunal do not constitute or amount to a finding of misconduct on the part of the applicant and consequently whether the Tribunal disregarded the fact that this was not the employee's first breach of discipline and did not properly direct themselves on the provision of Section 12(2)(b) of the Employment Ordinance and the proviso made under Section 10(1) of the said Ordinance. (3) Whether an employee who has been summarily dismissed and such dismissal was found to be justified is entitled to be awarded payment in lieu of notice."

In effect and in view of the submissions and arguments of counsel, the questions required to be answered are (1) whether the Ordinance has preserved the employer's right at common law to rescind or terminate the employee's contract of service by

dismissing the employee summarily (without notice) and for good and sufficient cause (2) whether misconduct and what kind of misconduct on the part of the employee could constitute a repudiation by the employee of his contract of service or a ground for such rescission or summary dismissal (3) whether the Tribunal in fact found that the respondent was guilty of misconduct amounting to her repudiation of her contract of service, and (4) whether an employee who has been summarily dismissed for good and sufficient cause is entitled to payment in lieu of notice or other compensation for the dismissal.

(1) Preservation of the employer's right

At common law, when an employee repudiates his contract of service, the employer has a right to rescind the contract by accepting the repudiation. The rescission is by way of dismissal of the employee summarily or without notice.

This common law right is expressly preserved by a proviso to section 10(1) and by section 22 of the Ordinance. Section 10(1) provides that:

"From the date this Part of this Ordinance comes into force the minimum notice required to be given by an employer to an employee to terminate the contract of employment where the employee has been continuously employed for thirteen weeks or more shall be....."

Provided that nothing in this subsection shall be deemed to take away the employer's right of summary dismissal that existed before this Ordinance came into force"

Section 22 provides that:

"Nothing in this part of this Ordinance shall be construed as derogating from the existing common law rights of the employer or employee."

(2) Misconduct and summary dismissal therefor

Section 12 of the Ordinance provides that:

"(1) From the date this Part of this Ordinance comes into force any employee who has been continuously employed by an employer for thirteen weeks or more and who is dismissed by his employer for any reason other than one or more of the reasons specified in subsection (2) of this section shall be entitled to compensation as assessed by the Tribunal.

(2) The reasons for dismissal which shall not give rise to a right to compensation are:

(a)

(b) Misconduct: Provided that no employee shall be dismissed for a first breach of discipline except in the case of gross misconduct"

The evident intent of section 12(2)(b) is to preserve the employer's common law right to dismiss his employee summarily (i.e. without notice) whenever the employee is guilty of misconduct to a degree or gravity which may be held to amount to his repudiation of his contract of service. Such misconduct (which may conveniently be referred to as repudiatory misconduct) has been explained in various judicial dicta.

In *Clouston & Co. Ltd. v Corry* (1906) A.C. 122, Lord James (delivering the judgment of the Privy Council) said (at p 129):

"There is no fixed rule of law defining the degree of misconduct which will justify dismissal from service.

It is a question for the jury whether the degree of misconduct was inconsistent with the fulfilment of the express or implied conditions of service, so as to justify dismissal."

In *Laws v London Chronicle Ltd* (1959) 2 A.E.R. 285, Lord Evershed M.R. (delivering the judgment of the English Court of Appeal) said (at p 287):

"To my mind, the proper conclusion to be drawn from the

passages which I have cited and the cases to which we were referred is that, since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service. It is, no doubt, therefore, generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard - a complete disregard - of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master and that, unless he does so, the relationship is, so to speak, struck at fundamentally."

The principle underlying these judicial dicta is that the employer may rescind or terminate the contract of service by summarily dismissing the employee if the employee is guilty of repudiatory misconduct (i.e. if the employee's misconduct amounts to a repudiation of the contract in that the misconduct constitutes a breach of a condition or fundamental term or a fundamental breach or an anticipatory breach of the contract).

(3) The Tribunal's findings

The findings of the Tribunal are manifestly inconsistent. On the one hand, the Tribunal found that the appellant had discharged the burden of proving "that the reason for dismissal was one of those allowed by subsection 2 of section 12 of the Ordinance". This was in effect a finding that the respondent was guilty of the gross or repudiatory misconduct which section 12(2) of the Ordinance declares to be one of "the reasons for dismissal which shall not give rise to a right to compensation". On the other hand, the Tribunal found "that the circumstances were not such as

to warrant summary dismissal." Whereupon, the Tribunal awarded to the respondent compensation by way of remuneration in lieu of notice.

In awarding compensation to the respondent, the Tribunal did not rely on wrongful dismissal. Instead, they invoked section 14 of the Ordinance. The Tribunal evidently interpreted section 14 as authority for the award of compensation to the respondent in spite of the Tribunal's finding that the respondent was not wrongfully dismissed. Accordingly, the crucial question required to be answered is whether an employee who has been summarily dismissed for good and sufficient cause is entitled to compensation for his dismissal and whether section 14 of the Ordinance is authority for the award of such compensation.

(4) Compensation for dismissal

There can be no doubt that an employee who was wrongfully dismissed is entitled to compensation by way of damages for the wrongful dismissal (which is in effect a repudiatory breach of the contract of service). Where the employee's contract is terminable by notice and the wrongful dismissal is a wrongful summary dismissal (i.e. a dismissal without good and sufficient cause and without the requisite notice), the measure of compensation or damages would normally be the liquidated sum which the employee would have received if the contract had been properly terminated by the requisite notice or by the payment of remuneration in lieu of notice.

Where, however the employee was summarily dismissed for good and sufficient cause, he is not entitled to compensation for the dismissal unless a statute provides for such compensation. The question to be answered is whether section 14 of the Ordinance authorises such compensation.

Section 14 provides that:

"In any application by an employee to the Tribunal

claiming compensation for dismissal it shall be for the employer to show that the reason for dismissal was one of those allowed by subsection (2) of section 12 of this Ordinance and that taking into account all the relevant circumstances, it was reasonable for him to dismiss the employee for that cause:

Provided that it shall not be reasonable for an employer to dismiss an employee because of his misconduct unless the employer exercises his right to dismiss within a reasonable time after he learns of the misconduct."

The requirement that the employer should act reasonably when exercising his common law right of summary dismissal is a product of English industrial legislation whereunder certain employees enjoy a statutory right not to be unfairly dismissed. Under that legislation, an employee may have been unfairly dismissed although he was dismissed for good and sufficient cause. There, the concept of reasonableness is the means whereby the conflict between the employer's common law right of summary dismissal for good and sufficient cause and the employee's statutory right not to be unfairly dismissed is required to be resolved.

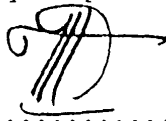
The Ordinance does not give to the employee any right not to be unfairly dismissed. Instead, it expressly confirms the employer's right of summary dismissal for good and sufficient cause. The introduction of the concept of reasonableness in section 14 creates an anomaly as a result of which section 14 finds itself uncomfortably juxtaposed with section 10(1) (proviso), section 12(1) and (2) and section 22.

In my judgment, the Ordinance (including section 14 thereof) confers no right to compensation upon any employee who has been summarily dismissed for good and sufficient cause. There are at least three good reasons for that conclusion. Firstly, section

12(1) and (2) and section 22 expressly deny such compensation. Secondly, since the employee has no statutory right not to be unfairly dismissed, there is no correlative statutory duty on the part of the employer to refrain from dismissing the employee unfairly. Accordingly, the exercise by the employer of his common law right of summary dismissal for good and sufficient cause cannot amount to a breach of statutory or other duty which could engender liability to pay compensation. Thirdly, section 14 (which is entitled "burden of proof") prescribes adjectival law which could not have been intended to prevail over section 10(1)(proviso), section 12(1) and (2) and section 22 - all of which prescribe substantive law.

(5) Summary

I would therefore answer the questions posed as follows:- (1) The Ordinance expressly preserves the employer's common law right to dismiss his employee summarily (without notice) for good and sufficient cause. (2) Repudiatory misconduct on the part of the employee survives as a good and sufficient cause for summary dismissal of an employee. (3) The Tribunal evidently found that the respondent was guilty of repudiatory misconduct. (4) Since an employee has no statutory right not to be dismissed unfairly, his summary dismissal for good and sufficient cause does not result in liability on the part of his employer to pay compensation for such dismissal.



.....
SIR VINCENT FLOISSAC
Chief Justice

I concur.

.....
C.M. DENNIS BYRON
Justice of Appeal

I concur.

.....
MR. NICHOLAS J.O. LIVERPOOL
Justice of Appeal