

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

MONTSERRAT

MNILTAP 2019/0002

BETWEEN:

INGRID BRANFORD-HUGHES

Appellant

and

GOLDEN YEARS HOME FOR THE ELDERLY

Respondent

Before:

The Hon. Mr. Mario Michel
The Hon. Mr. Paul Webster
The Hon. Mr. John Carrington, QC

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

Appearances:

Mr. Ralph A Francis for the Appellant
Ms. Chivone Gerald for the Respondent

2020: January 28;
May 26.

*Civil Appeal — Employment Law — Summary dismissal — Labour Code of Montserrat—
Section 61(1) of Labour Code — Gross misconduct—Section 61(2)) (a) Labour Code —
Unfair dismissal —Termination based on warning—Section 61(3) of Labour Code —
Whether the Tribunal was entitled to refer to the previous warnings — Entitlement of Court
to review the decision of the Labour Tribunal — Section 26 of Labour Code — Findings of
fact based on printed evidence*

Ms. Ingrid Branford-Hughes (“the appellant”) was employed by Golden Years Home for the Elderly (“the respondent”) as a caregiver. The respondent is a statutory body that operates as a home for elderly persons in Montserrat. The respondent operates the home in accordance with policies and rules. The rules stipulate that at least two workers should assist bed-ridden and disabled residents, and, if assistance is needed for any task, it should not be sought from persons who are not employed by the respondent. On 13th

June 2017, the appellant and a co-worker were changing the clothing of a resident, when the resident fell to the floor. The appellant left the premises to get external help instead of helping her co-worker to lift the resident from the floor on to a bed. The following day the appellant was involved in another incident with the same co-worker who said that the appellant threw a soiled diaper in her direction. The appellant denied that she threw the soiled diaper in the direction of the co-worker.

Following these two incidents in June 2017, the appellant was suspended from work with pay while the respondent carried out an investigation into the incidents. Upon the conclusion of its investigation, the respondent by way of termination letter dated 25th August 2017, summarily terminated the appellant's employment. The termination letter stated that the appellant's actions on the 13th and 14th of June 2017 deliberately violated the respondent's policy and procedures and amounted to gross misconduct.

The appellant referred the dispute to the Labour Commissioner who in turn referred it to the Labour Tribunal ("Tribunal"). The Tribunal conducted a full hearing into the dispute, considering not only the incidents on the 13th and 14th June 2017, but also evidence of alleged misconduct by the appellant in 2011 and 2015 ("historical misconduct"). The Tribunal also considered whether the respondent had warned the appellant of this misconduct prior to her dismissal. On 20th February 2019 the Tribunal delivered its written decision, finding that the appellant should have assisted her co-worker in lifting the resident who had fallen; that the appellant temporarily abandoned her post when she went to seek external help; and that there was an incident regarding a soiled diaper on the 14th June 2017. The Tribunal found that the appellant was not unfairly dismissed.

Being dissatisfied with the decision of the Tribunal, the appellant appealed to the Court of Appeal under section 26 of the Labour Code of Montserrat ("Code") and in accordance with the procedure in Part 61 of the Civil Procedure Rules 2000. The main issues that arise for determination by this Court are whether the issue of abandonment is a question of fact based on the evidence; whether the Tribunal was entitled to refer to and rely on the appellant's historical misconduct and the previous warnings; and whether the appellant was unfairly dismissed.

Held: allowing the appeal; setting aside the decision of the Tribunal dated 20th February 2019; remitting the dispute to the Labour Tribunal to be heard by a new panel of members; ordering that the rehearing take place on the affidavits already filed in the dispute; and ordering each party to bear their own costs of the appeal, that:

1. In treating with the dispute surrounding the events of the 13th and 14th of June 2017, the Tribunal erred in taking into consideration the historical misconduct of the appellant in its assessment of the fairness of the respondent's decision to summarily terminate the appellant and incorrectly treated the dispute as a warning case pursuant to sections 61(3) and (4) of the Code. The respondent itself had not in its case relied on these allegations nor did it rely on the warning procedure as set out in sections 61(3) and (4) of the Code. By relying on same, the Tribunal gave the respondent, on whom the burden lies, the benefit of a lower threshold

under section 61(3) to justify the summary dismissal of the appellant's employment. Unlike the threshold for summary dismissal, which requires the employer prove that the employee's behaviour amounts to gross misconduct and that it would be unreasonable to require the employer to continue the employment contract, the threshold under section 61(3) only requires that the employee repeat the misconduct about which he had been warned.

Section 61 of the **Labour Code** No. 12 of 2012, Laws of Montserrat applied.

2. The Tribunal's decision though final and binding is open to review by the Court of Appeal on a point of law under Section 26 of the Code. Based on the Court's finding that the Tribunal erred as a matter in law by considering the historical misconduct in coming to its decision, and by extension treating the case as a warning case, this Court is entitled to review the decision of the Tribunal.

Section 26 of the **Labour Code** No. 20 of 2012, Laws of Montserrat applied.

3. The question of whether misconduct justifies summary dismissal is a question of fact. The Court is very reluctant to make findings of fact based on printed evidence. The Court will only undertake such an exercise in exceptional circumstances. There were no exceptional circumstances in this case and the Court declined to make such a finding on the printed evidence.

Henry v Mount Gay Distilleries [1999] Lexis Citation 2002 applied.

JUDGMENT

- [1] **WEBSTER JA [AG.]:** This is an appeal by Ingrid Branford-Hughes ("the appellant") against the decision of the Labour Tribunal ("Tribunal") established under the provisions of the **Labour Code of Montserrat**¹ that her employment with Golden Years Home for the Elderly ("the respondent") was properly terminated for gross misconduct.

Background

- [2] The respondent is a statutory body that operates a home for elderly persons in Brades, Montserrat. The respondent operates the home in accordance with policies and rules. Two of the rules that are relevant to this appeal are that at least

¹ No. 20 of 2020, Laws of Montserrat.

two workers should assist bed-ridden and disabled residents, and, if assistance is needed for any task, it should not be sought from persons who are not employed by the respondent.

- [3] In March 2009 the appellant was employed by the respondent as a cleaner. In due course she was promoted to the position of caregiver. On 13th June 2017 she was on duty with a co-worker. While performing a procedure to change the clothing of a male resident, he fell to the floor. Instead of helping her co-worker to lift the resident and place him in a bed, the appellant left the premises to seek help to lift the resident off the floor and put him on a bed. By the time she returned the resident had been lifted from the floor and was in a bed.
- [4] The following day she was involved in an incident with the same co-worker who said that the appellant threw a soiled pamper in her direction. The incident was investigated by the police, but no charges were brought against the appellant. The appellant denied that she threw the soiled pamper in the direction of the co-worker.
- [5] There is also evidence of alleged misconduct by the appellant in 2011 and 2015 ('the historical misconduct').
- [6] Following the two incidents in June 2017, both the appellant and the co-worker were suspended from work with pay, while the management of the respondent carried out an investigation into the incidents. The appellant and the co-worker were allowed to present their versions of what happened on the 13th and 14th of June to the persons carrying out the investigation.
- [7] On 25th August 2017 the respondent summarily terminated the appellant's employment. The reasons for the termination are set out in the respondent's termination letter dated 25th August 2017. The letter referred to the two events on

the 13th and 14th June 2017 and the investigation by the officers of the respondent and concluded:

“Please be advised that the reports relating to the incident that occurred on the evening of June 13, 2017 and Minutes of the meeting held on June 29, 2017 were tabled at an Executive Committee Meeting held on August 2, 2017 and due consideration of what is in the best interest of the Respondent to include its Residents, Management and Staff were addressed. The Committee was of the view that your actions were inconsistent with the faithful discharge of your duties as a Caregiver working at the Respondent in excess of eight years (8). The Committee concluded that your behaviour was improper and demonstrated (i) wrongdoing and (ii) a deliberate violation of the Respondents policy and procedures. Given the Respondent’s functions and business; coupled with your responsibilities within the organization, your actions qualify as gross misconduct.

As a result, the decision was taken to summarily terminate your employment with Golden Years Foundation effective immediately. You are informed that you are not entitled to any period of notice or payment in lieu of notice. Since you have no holiday remaining you have no outstanding holiday entitlement.

Please be guided accordingly.”

The letter was signed by Mr. Kenneth E Scotland, chairman of the respondent. I note that the letter does not refer to the historical misconduct by the appellant (which I deal with below). It refers to the two incidents on the 13th and 14th June 2017 and stated that the appellant took no responsibility and showed no remorse for her actions, she showed total disregard and disrespect for management, and her behavior demonstrated a deliberate violation of the respondent’s policies and procedures.

- [8] The appellant was dissatisfied with her dismissal and referred the dispute to the Labour Commissioner, who in turn referred it to the Tribunal . The Tribunal conducted a full hearing into the dispute taking written and oral evidence from the appellant and two officers of the respondent. The Tribunal decided that the appellant was not unfairly dismissed by the respondent. I will return to the Tribunal's decision below.

The appeal

- [9] The appellant was dissatisfied with the Tribunal's decision and sought to appeal to the Court of Appeal. The procedure for appealing against a decision of the Tribunal is by case stated. The procedure is set out in section 26 of the **Labour Code of Monsterrat ("the Code")** under the heading "Appeals of the Tribunal" -

"(1) A decision of the Tribunal is final and may only be appealed on a point of law by way of case stated to the Court of Appeal.

(2) An appeal under subsection (1) shall be brought within 28 days of the issuance of the written decision."

It is noteworthy that the section states that the Tribunal's decision is final, and that an appeal can only be brought on a point of law.

- [10] Part 61 of the **Civil Procedure Rules 2000** contains the details of the procedure for appealing to the Court of Appeal by case stated. The intended appellant must apply to the Court of Appeal for an order requiring the person or tribunal's decision that is being challenged to state a case. The appellant complied with this procedure by filing a notice of appeal on 15th March 2019 and the Tribunal filed the case stated on 18th July 2019. The case stated refers to the appellant's notice of appeal and requested the determination by the Court of Appeal of the following issues:

- (i) Whether the Tribunal was correct when it determined that the rules of natural justice were not breached.
- (ii) Whether the Tribunal was correct when it found that the appellant abandoned her post as care giver at the Home on 13th June 2017.
- (iii) Whether the Tribunal was correct when it found the appellant was not deemed to be a whistle blower.
- (iv) Whether the Tribunal erred when it used the written warnings of disciplinary action prior to the events of June 2017.

[11] The notice of appeal contained four grounds of appeal:

- (1) "The basis of my dismissal was that on 13th June 2017 and the 14th [June] 2017 two events occurred involving a co-worker and myself. My co-worker was not called to give evidence neither were other persons who could have spoken to the issue.
- (2) The findings that "Ms. Branford-Hughes in leaving the resident on the floor and leaving the compound of the Home 'temporarily' abandoned her post" cannot be supported by law or the facts.
- (3) The findings that "the incident of a soiled pamper did occur [and] the fact that no fecal matter being found on the foot or part of the other caregiver does not make it less so" is erroneous in law.
- (4) The tribunal erred in law when it took into consideration matters which occurred in years 2011; and 2015 (3) times. There is no mention that these were matters taken into consideration at the time of my dismissal."

[12] The issues listed in the case stated are the issues that are properly before this Court for determination. However, in dealing with them I will consider the grounds of appeal listed in the notice of appeal only to the extent that they were pursued by counsel for the appellant, Mr. Ralph A Francis, and responded to by counsel for the respondent, Ms. Chivone Gerald.

[13] During his submissions to this Court Mr. Francis stated that he was pursuing only ground 2 (abandonment) and ground 4 (warnings before dismissal) of the case stated, as well as his overall complaint that the appellant was unfairly dismissed. The issue of unfair dismissal was not clearly pleaded in the notice of appeal but I extract it from grounds 1 and 2, and ground 1 of the case stated.

- [14] The essence of Ms. Gerald's response was that the issue of abandonment is a question of fact based on the evidence; the Tribunal was entitled to and did refer to the historical misconduct and previous warnings, but did not rely on them in coming to their decision; and the appellant was not unfairly dismissed. These three matters constitute the issues for determination by this Court and because they overlap, I will deal with them together.

The Labour Code

- [15] Before proceeding with the analysis in this case it is helpful to set out the relevant provisions of the **Code**.
- [16] The Tribunal that heard the dispute between the parties was established by section 23 of the **Code** for the purpose of settling disputes referred to it by the Labour Commissioner. The dispute in this matter was referred to the Tribunal by the Labour Commissioner on 25th October 2017.
- [17] Section 56 of the **Code** provides that an employee has the right not to be unfairly dismissed by his or her employer, and section 59 details the procedure for taking disciplinary action against an employee who is alleged to have misconducted himself.
- [18] Section 61(1) states that "... an employer is entitled to dismiss summarily, without notice, an employee who is guilty of gross misconduct of a nature that it would be unreasonable to require the employer to continue the employment contract." Gross misconduct includes (but is not limited to) situations where "...the employee has conducted himself or herself in a manner as to clearly demonstrate that the employment contract cannot reasonably be expected to continue." (See section 61(2)(a)).
- [19] Section 61(3) and (4) of the **Code** provide that where an employee is guilty of misconduct such that the employer cannot reasonably be expected to continue the employment if the behavior is repeated, the employer can give the employee a

written warning that if the misconduct is repeated within the following six months, the employer may terminate the contract without further notice.

- [20] Section 67(1) places the burden of proof in a claim for unfair dismissal on the employer to prove that he acted reasonably in dismissing the employee. The section reads: "Where an employee claims to be unfairly dismissed, the employer has to prove that it was reasonable for him to dismiss the employee and that the procedures set out in the Code were duly observed."

The decision of the Tribunal

- [21] The procedure used by the respondent to terminate the appellant's employment culminating in the termination letter of 25th August 2017 was based on gross misconduct justifying termination without notice in accordance with section 61(1) of the **Code**. The termination letter referred to the appellant's behavior during the two events of June 2017² and found that they amounted to gross misconduct justifying summary dismissal. The respondent did not rely on the allegations of historical misconduct by the appellant. Neither did it rely on the warning procedure in section 61(3) and (4). It follows that the dispute that was before the Tribunal was whether the respondent had established that the conduct of the appellant on the 13th and 14th June 2017 was sufficiently serious to amount to gross misconduct justifying summary dismissal.
- [22] The Tribunal delivered its written decision on 20th February 2019. It took a holistic approach to the dispute and considered not only the incidents on the 13th and 14th June 2017, but also the history of the relationship between the appellant and the respondent. The Tribunal found, against the appellant, that (i) she should have assisted her co-worker in lifting the resident who had fallen; (ii) she temporarily abandoned her post (by leaving the premises to get assistance when the resident fell); (iii) that the incident regarding the soiled diaper on 14th June 2017 did take place and it did not matter that fecal matter was not found on the foot or elsewhere of the co-worker. These findings were made on the evidence before the Tribunal

² See paragraphs 3 and 4 above.

and this Court cannot, as a matter of law, interfere with them. They can be used to support a finding that the appellant was guilty of gross misconduct sufficient to terminate her employment without further notice.

[23] The difficulty that I have with the Tribunal's decision is the way in which it arrived at its conclusion. The members considered the evidence of the historical misconduct in a manner that suggests that this conduct formed an important part of its decision-making process, not just background. I will illustrate this by reference to the written decision:

- (a) In the body of the decision at page 231 of the record of appeal the Tribunal listed the said historical misconduct between September 2011 and February 2015 and then stated that "The tribunal finds that Ms. Branford Hughes was duly warned" followed by a reference to section 61(4) and (5) (the warning sections). The Tribunal then set out section 61(4) and (5) in full.³
- (b) Finding No. 10 on page 241 of the record is that "Incidents of June 13 & 14, 2017 occurred within six months." I am not sure what this sentence means. There were no incidents of alleged misconduct or warnings given within the six months leading up to the events of June 2017.
- (c) Immediately after finding No.10 the Tribunal made its overall finding that "Given the foregoing this tribunal finds that Mrs Branford Hughes was not unfairly terminated by the letter from the chairman Mr. Kenneth Scotland dated August 25, 2017." The opening words "Given the foregoing..." suggest that the Tribunal relied on the 10 findings preceding the conclusion in coming to its overall decision that the dismissal was not unfair. The ten findings include findings 5, 6 and 7 which relate to the historical misconduct.

³ Record of Appeal at page 232.

- [24] I note further that there is no evidence that the respondent issued section 61(3) warnings to the appellant after the historical events. The contemporaneous letters that are in the record amount to no more than reprimands of the appellant by the respondent. None of the incidents occurred within six months before the events of June 2017. If, as Ms. Gerald submitted, the Tribunal referred to the events of the historical misconduct as mere background to the main decision regarding the misconduct in June 2017, I would not have had a problem with the findings. However, I find that the findings in respect of the historical misconduct formed an integral part of the Tribunal's decision-making process as set out in the preceding paragraph.
- [25] There is a difference between the procedures for summary dismissal (section 61(1)) and dismissal following warnings by the employer in section 61(3) and(4) .
- [26] The threshold for proving gross misconduct justifying summary dismissal is, in my opinion, higher than in a case where a misbehaving employee who has been warned in accordance with section 61(3) and then repeats the misconduct. In the former case (summary dismissal) the employer has to prove that the employee's misbehavior amounts to gross misconduct and that it would be unreasonable to require the employer to continue the employment contract. In the case of termination based on warnings, the employer has to meet the lower threshold of proving that the employee misconducted himself in a manner that the employer cannot reasonably be expected to tolerate repetition. The employer has to prove that the employee was warned in accordance with section 61(3) of the **Code** that repetition will result in termination, and the employee repeated the misconduct. Once the proper warning was given the employer has the less onerous burden of proving that the conduct relied on for termination was similar to the conduct warned in the previous six months. The employer does not have to prove gross misconduct, only that the employee repeated the misconduct about which he was warned.

[27] On my review of the record I am satisfied that the Tribunal treated the dispute as one where the respondent was relying on the historical misconduct, coupled with the events of the 13th and 14th June 2017, as support for and justification of the respondent's conclusion that the appellant was guilty of gross misconduct sufficient to terminate her employment without notice. In doing so the Tribunal did not treat the historical misconduct of the appellant as mere "obiter" to the main decision, as submitted by Ms. Gerald. It treated the case as a warning case and considered the evidence of historical misconduct. By doing so the Tribunal gave the respondent, on whom the burden lies, the benefit of a lower threshold to justify the summary dismissal of the appellant's employment. This procedure is inconsistent with section 61(6) which provides that "The employer shall be deemed to have waived his or her right to terminate the employment of an employee for misconduct where he or she has failed to do so within 6 months after having knowledge of the misconduct." The respondent did not rely on the events of historical misconduct to terminate the appellant when they happened or within six months after any of them, and, quite correctly, did not rely on any of them when they dismissed the appellant in August 2017. The Tribunal should have done the same. It should not have relied on the historical misconduct, except for background, in assessing the fairness or otherwise of the appellant's dismissal. The Tribunal should have judged her behaviour on the basis what happened on the 13th and 14th June 2017.

[28] In the circumstances I find that the Tribunal erred in taking into consideration the historical conduct of the appellant in assessing whether the respondent was correct in treating her conduct in June 2017 as gross misconduct justifying summary dismissal within the meaning of section 61(1) of the **Code**.

[29] The decision, though final within the meaning of section 26 of the **Code**, is open to review by this Court on a point of law. The point of law in this case is issue number 4 in the case stated and ground of appeal (D) in the notice of appeal, namely, the Tribunal's consideration and reliance on the historical misconduct of

the appellant. I have found that the Tribunal erred as a matter of law in considering the historical evidence in coming to its decision, and, by extension, treating the case as a warning case. This Court is therefore entitled to review the decision of the Tribunal.

[30] The options for this Court are to (1) let the decision stand notwithstanding the error by the Tribunal, (2) remit the dispute to the Tribunal for rehearing, or (3) consider the material that is before the Court and make a finding of whether the respondent was correct in terminating the appellant without notice for gross misconduct in June 2017

[31] In considering how to dispose of this matter I bear in mind that a finding of summary dismissal based on gross misconduct, commonly referred to as being “fired”, is a serious matter with far reaching financial, professional and reputational consequences. I also consider that one of the underpinnings of the **Code** and good industrial relations is that employees should be treated fairly. I do not think that it would be fair to the appellant to leave the decision of the Tribunal in place.

[32] Equally, I do not think that this Court should attempt to make a finding as to whether the appellant’s conduct amounted to gross misconduct justifying summary dismissal. Such a finding is a finding of fact and involves evaluating the evidence that was led before the Tribunal. The crucial evidence in this case is what happened at the Home on the 13th and 14th of June 2017. This evidence was in the form of affidavits and oral evidence from the appellant and two representatives of the respondent. The witnesses were cross examined. The members of the Tribunal had the opportunity to observe the witnesses as they gave their evidence and to assess their demeanor. This Court does not have that advantage and in any case would be very reluctant to make findings of fact based on the printed evidence. A Court of Appeal will undertake such an exercise only in exceptional circumstances and there are no exceptional circumstances in this case. This is a case of unfair dismissal and a finding of misconduct justifying summary dismissal

is quintessentially a finding of fact and degree to be made by the trial court or tribunal. As Lord Browne-Wilkinson said in **Henry v Mount Gay Distilleries**⁴:

“The question whether misconduct is such as to justify summary dismissal is a question of fact and degree. As such, it is a matter for decision by the trial judge and not by the appellate courts: **Clouston & Co. Limited v. Corry [1906] A.C. 122**”⁵

In the circumstances I would decline to make any findings of fact based on the printed evidence. The dispute should be remitted to the Tribunal for a rehearing.

Conclusion

[33] I would answer the 4th point in the case stated by finding that the Tribunal erred as a matter of law in considering and relying on the evidence of misconduct and warnings that occurred more than six months prior to the events of June 2017. This finding makes it unnecessary to deal with any other issues in the case stated and the notice of appeal. I would make the following orders:

- (1) The appeal is allowed and the decision of the Tribunal dated 20th February 2019 is set aside.
- (2) The dispute is remitted to the Labour Tribunal to be heard by a panel of members that does not include the chairman and members who heard the dispute in 2018 and rendered their decision in February 2019.
- (3) The rehearing shall take place on the affidavits already filed and the parties shall be entitled to call the deponents of such affidavits to give oral evidence and be cross examined.

⁴ [1999] Lexis Citation 2002.

⁵ Ibid at p. 3.

(4) Each party shall bear their own costs of the appeal.

I concur.
Mario Michel
Justice of Appeal

I concur.
John Carrington, QC
Justice of Appeal [Ag.]

By the Court

Chief Registrar