COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
IndTribApp. No. 28 of 2020

B E T W E E N

WESTECH SECURITY

First Appellant

CHRISTOPHER ADDERLEY

Second Appellant

AND

BRUNO ROLLE

Respondent

BEFORE:	**The Honourable Mr. Justice Isaacs, JA** **The Honourable Mr. Justice Jones, JA** **The Honourable Madam Justice Bethell, JA**
APPEARANCES:	**Ms. Janet Bostwick Dean, with Ms. Deandra Johnson, Counsel for First and Second Appellants** **No appearance by or on behalf of the Respondent**
DATES:	**28 April 2021; 10 June 2021; 7 October 2021**

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Industrial Tribunal Appeal – Employment Law – Constructive Dismissal - Industrial Relations Act Section 64(2) – Job abandonment - The approach an appellate court takes in appeals against findings of fact by a trial judge

The Respondent was hired as a part-time security officer by the Appellants in June, 2012 as the respondent had full-time employment elsewhere. In January 2014 the Appellant learnt that National Insurance contributions were not being made on behalf of the Respondent by either of his employers. The First Appellant then began making the required contributions which moved the Respondent from part-time to full-time employment with the Appellant. The Respondent commenced proceedings against the Appellants in the Industrial Tribunal citing that he had been unfairly dismissed after calling the Appellant for a job letter in 2017 and being told that he could not be provided same. The Tribunal found in favour of the respondent and ordered the Appellant the pay to the respondent the sum of six thousand and seventy-nine dollars plus interest at the rate of 10% per annum from the date of the decision (31 January 2020) until payment. The Appellants

appeal the decision on various grounds, inter alia, that the "judge was wrong in law and in fact when she found that the appellants constructively dismissed the respondent in circumstances where the respondent abandoned his job by failing to report to work from January 2017 to April 2017". They also asked for cost to be awarded to them in the matter. The court heard the submissions on behalf of the appellants only as there was no appearance by or on behalf of the respondent and reserved its decision.

Held: appeal allowed; we quash the decision of the VP and remit the matter to the Industrial Tribunal for re-trial before another judge. No order for costs.

The VP found as a fact that, "**... Westech produced the 29 December 2016 schedule with a copy of a computer print-out as to when it was created, but did not prove Mr Rolle actually received the schedule.**" We note however, that the respondent himself testified, "**They gave me a schedule to work but where they switched locations it conflicted with the work hours I had.**"

It would appear therefore that the finding of the VP is not consistent with the evidence in the case. The Court is not satisfied that the VP has gotten it right when she concluded that the respondent did not abandon his job and that the appellant had constructively dismissed the respondent.

As it relates to the request for cost, we may deal quite shortly with the request since costs are not awarded in industrial tribunal matters. Section 64(2) of the Industrial Relations Act ("the Act") states, inter alia: **"... and the Court of Appeal may make such final or other order (other than an order as to costs) as the circumstances of the matter may require."** Thus, there will be no order for costs.

Lewis v Wandsworth London Borough Council [2020] All ER (D) 132 (Nov) applied
Rambarran and others v R [2019] 5 LRC 431 considered
Saunders v Adderley [1999] 1 WLR 884 considered
Watt v. Thomas [1947] 1 All ER 582 considered

J U D G M E N T

Judgment by the Honourable Mr. Justice Jon Isaacs JA,

1. The appellants appeal the decision of Vice President of the Industrial Tribunal Simone Fitzcharles ("the VP") made orally initially on 31 January 2020, and subsequently in writing, on 4 February 2020. The appellants challenge specifically paragraph 28 of the VP's finding:

> **"1. The appellants failed to satisfy the notice requirements set out in Section 29(1)(b) of the Employment Act (paragraph 28(1) of the ruling);**

2. The appellants failed "to pay the [respondent] the agreed upon wage and/or to give him the promised opportunity to earn that wage" (paragraph 28(2) of the ruling); and,

3. The appellants constructively dismissed the respondent (paragraph 28(3) of the ruling)."

2. They ask that we overrule the VP's decision and award them the costs of their appeal. We may deal quite shortly with the request for costs since costs are not awarded in industrial tribunal matters. Section 64(2) of the Industrial Relations Act ("the Act") states, inter alia: **"... and the Court of Appeal may make such final or other order (other than an order as to costs) as the circumstances of the matter may require."** Thus, there will be no order for costs.

3. The grounds on which the appellants rely were set out as follows:

"1. The judge was wrong in law and in fact when she found that the appellants sent the respondent away from the job without pay and without notice pursuant to section 29(1)(b) of the Employment Act in circumstances where the respondent abandoned his job by failing to report to work from January 2017 to April 2017 (paragraph 28(1) of the ruling).

2. The judge was wrong in law and in fact when she found that the appellants sent the respondent away from the job without notice and without paying him "the agreed upon wage and/or [giving] him the promised opportunity to earn that wage" in circumstances where the respondent abandoned his job by failing to report to work from January 2017 to April 2017 (paragraph 28(2) of the ruling).

3. The judge was wrong in law and in fact when she found that the appellants constructively dismissed the respondent in circumstances where the respondent abandoned his job by failing to report to work from January 2017 to April 2017 (paragraph 28(3) of the ruling)."

4. On 25 September 2020, during an application to settle the record, the Registrar of the Court of Appeal made an order that contained, inter alia, the following:

"THAT Counsel for the Appellants prepare and file the record within sixty (60) days hereof in accordance with her undertaking".

5. The record should have been filed on or before 25 November 2020. This was not done. An application for an extension of the time limit to file the record of appeal and for service of the record by way of substituted service via advertisement of the same in one of the daily newspapers was filed on 20 April 2021. This means another 146 days had passed.

6. On 28 April 2021, the Court extended the time for complying with the settling of the record to the day following the date upon which the appellants actually filed the record. Additionally, the Court directed that the appellants serve notice on the respondent of the hearing of the appeal by way of substituted service by way of advertising with two notices in the newspapers, one in The Guardian and one in The Tribune on two separate occasions.

7. The matter was adjourned to 10 June 2021 at 12 noon, for the substantive hearing of the appeal.

8. At approximately 12:34pm on 10 June 2021, the Court proceeded to hear the appeal in the absence of the respondent because we were satisfied that the appellants had complied with our Order for substituted service of the date and time of the hearing; such satisfaction being due to an affidavit of Deandra Johnson filed on 10 June 2021, that averred to the publication of the notices; and exhibiting the notices.

History

9. The appellant has set out the background to their case hence I merely reproduce it to provide a context for their appeal. Under "The Facts" the following appears at paragraphs 4 through 11:

> **"4. The Second Appellant and the Respondent were friends. The Respondent encountered some financial difficulties and approached the Second Appellant for work. The Respondent told the Second Appellant that he was a full-time employee of Compass Point and only needed some part-time work.**
>
> **5. The Appellant's (sic) hired the Respondent as a part-time security officer on or about June 11, 2012. The Respondent signed the Respondent's "Code of Conduct" and "Companies Policies".**
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> **6. The Appellants were concerned to ensure that they were in compliance with the law with respect to National Insurance. Inasmuch as the Respondent represented that he was employed fulltime somewhere else they required him to co-sign a letter, dated June 15, 2012, wherein he confirmed that National Insurance contributions were being paid by "his first job" and therefore did not have to be paid by the First Appellant.**
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> **7. In January 2014 the Appellants learned that National Insurance contributions were not being made by any employer on behalf of the Respondent. As a result the First Appellant began making the required contributions thereby moving the Respondent from part-time to full-time employment. This change of circumstances was documented by the First Appellant and signed by the Respondent.'**
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> **8. In October 2016 the Appellants state that the Respondent requested that he be changed back to part-time employment so that Compass Point could be his primary employer. This request was documented in an unsigned letter which was received by the**

Appellants on October 18, 2016. The Respondent denied that he wrote the letter and pointed to the fact that he had not signed the copy presented to the Tribunal. The Tribunal did not accept that the Respondent wrote the letter.

9. The parties then had several meetings. The outcome of those meetings was documented in the December 15, 2016 letter. Therein, the Appellants explained that they were paying the employer's portion of the National Insurance contributions and giving the Respondent vacation and other full-time employee benefits. In the circumstances, the Appellants were the primary employers and the other employer was the secondary employer. The secondary employer would have to work around the hours that they required him to work (and not the other way around). The letter indicated that the manner to resolve it is to have the other employer become the primary employer by paying the employer's portion of the NIB contributions. As the other employer had not done so the Appellants schedule the Respondent to work fulltime as set out on the December 29, 2016, schedule. The schedule was then issued and the Respondent was scheduled to work on December 30 and 31 and January 1, 2, 5, 6, 7, 8, 9 and 12. Save for December 30 and January 6 when he was stationed at Dominoes Blue Hill location he was stationed at Dominoes South Beach location. The Respondent showed up for work as scheduled until January 1st, 2017 and then reported to work on January 6th 2017. This is evidence of the fact that he received the schedule. It is the Appellants' evidence that the Respondent did not report to work after January 6, 2017 and did not contact the work place. As a result the Appellants took the position that he had abandoned his job.

10. Sometime in May 2017 the Respondent called the Appellants to request a job letter. The Appellants refused to provide the said letter on the basis that it would be fraudulent. The Respondent commenced proceedings before the labour board and ultimately before the Industrial Tribunal.

11. The Respondent's case was that he did not abandon his job. He states that in December 2016 he was told that he was being placed on stand-by and that he should wait to be called for a shift. He stated that he called many times to make inquiries but was never given a shift. He was of the view that he remain employed until he asked for the job letter - on his evidence he asked for the letter in June 2017 - and the same was declined."

The Appeal

10. As indicated, the appellants challenge the VP's decision that effectively found that the respondent had not abandoned his job as contended for by the appellants and the appellants were liable to pay the respondent the sum of six thousand and seventy-nine dollars plus interest at the rate of 10% per annum from the date of the decision, i.e., 31 January 2020, until payment.

11. A crucial issue, therefore, is: did the respondent abandon his job? The VP's finding on that issue may be found in paragraphs 18 and 19:

> **"18. A copy of a roster was produced which listed the name of Bruno Rolle who was purportedly assigned by Security Manager Charles Moree to work on various days over the period. Mr Rolle stated that he never received this schedule and that the company should produce evidence to show that he got it and signed for it. Such evidence was not produced by Westech.**
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> **19. Having heard the testimony of Westech presented by Mr Adderley and Ms Toote, and that of Ivir Rolle, on the issue of whether he abandoned his job after working one shift of a schedule produced on 29 December 2016, I prefer Mr Rolle's account. Firstly, Westech produced the 29 December 2016 schedule with a copy of a computer print-out as to when it was created, but did not prove Mr Rolle actually received the schedule. It is not the creation, but rather the delivery of the schedule that is in issue. The purported author of the schedule, one Charles Moree, was not called as a witness. No personnel who allegedly issued the schedule to Mr Rolle was called to testify. Ms Toote could be of little to no assistance in relation to any of the facts relevant in this matter because she was not employed with Westech at the time and had no records to show Mr Rolle actually received the schedule. Mr Adderley could do no better as he apparently operates on a high level and did not issue schedules or get involved personally in the day to day handling of the security officers or their schedules. Much of the information he gave throughout the hearing was by reports from, for the most part, unidentified workers, except for the personal loans in which he was personally involved. Secondly, Westech produced no evidence Mr Rolle worked, as Mr Adderley purported, on 6 January 2017 then abandoned his job. No material witness from Dominoes where he allegedly worked his final shift or even a security guard Mr Rolle may have relieved or the one who would have relieved him after that alleged 6 January 2017 shift was called to give evidence to verify his presence on that day. No documentary evidence was produced to show that Mr Rolle was paid for the shift or that an NIB contribution was made in relation to his work on that day."**

12. At paragraphs 24-25 of her decision where she said as follows:

> **"24. As for whether Mr Rolle abandoned his employment, both Westech and Mr Rolle have given evidence which demonstrate that he needed his job at Westech. He was not as reliable as in the past because of the shift change, but he needed the work because of obvious financial reasons. Having observed the witnesses and considered their testimony on the issue of job abandonment, the Tribunal is not satisfied that Mr Rolle abruptly abandoned his job with Westech in January 2017. He needed the work, he worked consistently with Westech since 2012 and albeit the shift location change may have caused him to become more frequently tardy or absent, the Tribunal believes he continued to try and to be willing to work for Westech. If he did not care about it, he would not have raised the conflict in his schedule with Westech in an effort to get the company to adjust the location, which would enable him consistently to meet his obligations to Westech as he had done since 2012.**
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> **25. Neither Mr Toote nor Mr Adderley could definitively say, with first-hand knowledge, that Mr Rolle did not show up at Westech continuously on and after 29 December 2016 and call Westech continuously to try to get a work schedule. No witness with such first-hand knowledge was called by Westech. The witness for Westech simply were not the best witnesses to give evidence on the issues in this case. I accept that the evidence given by Mr Rolle trumps that of Westech in that the Tribunal is not convinced that the facts bear out that he abandoned his job."**

13. Having rejected the appellants contention that the respondent had abandoned his job, the VP then went on to consider those principles relating to dismissal of an employee without notice or payment in lieu of notice and the failure of the employer to provide work for the employee. It appears that the appellants' wish to have the Court overturn findings of fact made by the VP, in the expectation that as a consequence, the law relied upon by the VP to arrive at her ultimate conclusion would fall away.

Authorities

14. In the Privy Council case of **Saunders v Adderley** [1999] 1 WLR 884, Sir John Balcombe, speaking for the majority said as follows at page 889:

> **"It is well established that an appellate court should not disturb the findings of fact of the trial judge when his findings depend upon his assessment of the credibility of the witnesses, which he has had the advantage of seeing and hearing — an advantage denied to the appellate court. However, when the question is what inferences are to be drawn from specific facts an appellate court is in as good a position to evaluate the evidence as the trial judge: see *Dominion Trust Co. v. New York Life Insurance Co.*; *Benmax***

> ***v. Austin Motor Co. Ltd.*** **[1955] A.C. 370; *Whitehouse v. Jordan* [1981] 1 W.L.R. 246, 249, 252, 263, 269. The cases to which their Lordships were referred by counsel for the plaintiff were all cases where an appellate court had sought to disturb a finding of primary fact depending upon the trial judge's assessment of the credibility of the witnesses. This was not what happened in the present case: indeed on the most important question — the circumstances of the accident — the judge rejected the evidence of the plaintiff and accepted the defendant as a credible witness."**

15. In **Lewis v Wandsworth London Borough Council** [2020] All ER (D) 132 (Nov) at paragraph 14 Stewart, J made the following observation about the approach an appellate court takes to appeals against findings of fact by a trial judge:

> **"14. Considering the grounds of appeal, grounds (a), (b), (d) and (e) challenge the Recorder's evaluation from primary facts. Indeed, although the other grounds of appeal refer to matters of law, it is difficult to separate fact and law in this appeal. This Court in deciding whether the lower Court was "wrong" must have regard to the basic principles on appeal. These can be summarised as follows:**
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> > **i) As May LJ said in *Dupont de Nemours (EI) and Co v ST Dupont (note)* [2003] EWCA Civ 1368 at [94]**
> >
> > **"The review…will accord appropriate respect to the decision of the lower Court. Appropriate respect will be tempered by the nature of the lower Court and its decision-making process. There will also be a spectrum of appropriate respect depending on the nature of the decision of the lower Court which is challenged. At one end of the spectrum will be decisions on primary facts reached after an evaluation of oral evidence where credibility is an issue and purely discretionary decisions. Further along the spectrum will be multi-factorial decisions often dependent on inferences and an analysis of documentary material".**
> >
> > **ii) An Appeal Court will only interfere with a trial Judge's finding of fact, and allow an appeal on a basis of a challenge to such a finding, where it properly determines that the "finding of fact is unsupported by the evidence or where the decision is one that no reasonable Judge could have reached". The authorities for this are cited at paragraph 52.21.5 of Civil Procedure 2020 volume 1.**

> **iii) Where a Judge's evaluation of facts is challenged it is very difficult for an Appellate Court to place itself in the position of the trial Judge who would have to take account of both written and oral evidence. In *Re Sprintroom* [2019] EWCA Civ 932 at [76] the Court of Appeal said:**
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> **"…on a challenge to an evaluative decision of a first instance Judge, the Appeal Court does not carry out a balancing task afresh but must ask whether the decision of the Judge was wrong by some reason identifiable flaw in the Judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion""**

See also **Rambarran and others v R** [2019] 5 LRC 431.

16. I turn now to consider the submissions of Mrs. Bostwick-Dean bearing in mind the principles alluded to above on our approach to a trial judge's findings of facts. As I do so, I intend to deal with the third ground of appeal first because depending on the decision I reach thereon, the other two grounds may fall as the crux of their challenge rests on the VP's finding that the respondent had not abandoned his job.

Ground 3. The judge was wrong in law and in fact when she found that the appellants constructively dismissed the respondent in circumstances where the respondent abandoned his job by failing to report to work from January 2017 to April 2017 (paragraph 28(3) of the ruling).

17. Mrs. Bostwick-Dean contended that the VP was wrong to arrive at her conclusion that the appellant had not produced any evidence that the respondent got the schedule when the respondent had stated in his evidence as follows:

> **"First when I spoke to Mr. Adderley he wasn't aware of the job schedule I had. They gave me a schedule which wasn't crossing up with the schedule I had.... They gave me a schedule to work but where they switched locations it conflicted with the work hours I had."**

18. This finding by the VP is important because if it was shown that the respondent had received the work schedule, it would have undermined his story that he had not received the schedule and that he was told that the appellant was placing him on "stand-by"; and that would have necessarily affected the decision of the VP when deliberating on the veracity and reliability of the respondent's evidence.

Discussion

19. The VP found as a fact in paragraph 19 that, "**... Westech produced the 29 December 2016 schedule with a copy of a computer print-out as to when it was created, but did not prove Mr Rolle actually received the schedule.**" I note however, as Mrs. Bostwick-Dean contends, that the respondent himself testified, "**They gave me a schedule to work but where they switched locations it conflicted with the work hours I had.**"

20. It would appear therefore that the finding of the VP is not consistent with the evidence in the case. I have had regard to the dictum of Lord Thankerton in **Watt v. Thomas** [1947] 1 All ER 582 at 587 where the learned Judge stated:

> **"The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that the court has not taken advantage of his having seen and heard the witness, and the matter will then become at large for the appellate court."**

21. I am not satisfied that the VP has gotten it right when she concluded that the respondent did not abandon his job and that the appellant had constructively dismissed the respondent.

Conclusion

22. In the circumstances, I quash the decision of the VP and remit the matter to the Industrial Tribunal for re-trial before another judge.

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The Honourable Mr. Justice Isaacs, JA

23. I agree.

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The Honourable Mr. Justice Jones, JA

24. I also agree.

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The Honourable Madam Justice Bethell, JA