

In the Supreme Court of St. Helena

Citation: SHSC 17/2023

Civil

Appeal from the Labour Regulating Authority

Ambledale Cleaning Services Ltd

Appellant

-v-

Sylvia Castillo-Benjamin

Respondent

Judgment on Appeal dated 7th December 2023

The Chief Justice, Rupert Jones

1. This is my judgment on the appeal of the Appellant (Ambledale Cleaning Service or ‘ACS’) from a decision of the Labour Regulating Authority of St Helena (‘LRA’) on 20 July 2023.
2. I directed a hearing of the appeal in accordance with section 46(1B) of the Employment Rights Ordinance 2010 (‘the Ordinance’). Mr Colin Yon, the director of the Appellant, appeared in person at the hearing on 16 November 2023 which was conducted remotely by video. The Respondent, Ms Castillo-Benjamin, was represented by Kylie Hercules, trainee CILEx in the public solicitor’s office. I am grateful to Mr Yon and Ms Hercules for the quality of their written and oral representations.

The decision and ruling of the LRA

3. The LRA made its decision dated 20 July 2023 on the papers without a hearing but with the consent of the parties.
4. The LRA set out the background facts in relation to the Respondent’s claim for unfair dismissal in its ruling as follows:
 2. On 1st April 2019 Mrs Castillo-Benjamin was employed by Ambledale Cleaning Services as a cleaning supervisor working at the Community Care Centre.
 3. Problems began in January 2021 and due to a number of incidents from that time until 6th July 2021 she was demoted from supervisor to cleaner leading to a loss of income of £25 a month.

4. On the 15th July 2021 there was an incident between Mrs Castillo-Benjamin and her supervisor Mrs Ivy Thomas, it was alleged that she had been disrespectful to her.
 5. On the 20th July 2021 a letter was sent to Mrs Castillo-Benjamin asking her to attend an investigation meeting the following morning at 8.30am. On receipt of the letter Mrs Castillo-Benjamin upon reading it advised the person who delivered it that she would not be attending and that she had been told by her Lay Advocate not to talk or say anything to anyone.
 6. The letter advised that the meeting was to investigate the allegation of her disrespectful behaviour towards Mrs Thomas on the 15th July. She was told that if during the meeting it became clear that disciplinary action is possible then there would be a formal hearing at which she could be accompanied. She was further advised that if the allegation is found proven then it would amount to gross misconduct and may result in further disciplinary action.
 7. The LRA has concerns regarding this letter which are:
 - i. That Mrs Castillo-Benjamin was given little notice of the hearing
 - ii. That the nature of the allegation was not clearly specified and it was said that it proved it would amount to gross misconduct.
 8. The following morning Mrs Castillo-Benjamin did not attend the meeting. The minutes of the meeting record that the meeting was to discuss the incident of the 15th July 2021 and that Mrs Thomas was there. Also present was Mr Yon, a director, Miss Claire Bennett, cleaning supervisor, and Sherilee Grobler, secretary. The meeting started by Mrs Thomas being asked how things were since the altercation between herself and Mrs Castillo-Benjamin. Mrs Thomas was not asked to provide her version of the events of the 15th July 2021 instead other complaints about Mrs Castillo-Benjamin were brought up.
 9. The LRA has the following comments about this meeting:
 - i. There was no consideration of delaying matters to enable Mrs Castillo-Benjamin to reflect on her refusal to attend or to seek legal advice;
 - ii. There was no information received from Mrs Thomas about what happened on the 15th July 2021 despite the meeting being convened to investigate it.
 10. The minutes of the meeting record that at the end Mr Yon stated that ‘because we are not able to hear Mrs Benjamin’s side of things he would not terminate her employment at this point, but he would most likely take the decision to move her to work at another government property.’
 11. Contrary to his assertion that he would not terminate her employment Mr Yon wrote to Mrs Castillo-Benjamin on the same day terminating her employment with immediate effect. The reasons given were:
 - i. Refusal to attend the investigation that morning;
 - ii. Refusal to carry out reasonable instructions given to her by Mrs Thomas;
 - iii. Attitude to colleagues.
 12. Mrs Castillo-Benjamin was to be paid 2 weeks’ pay in lieu of notice and any holiday pay.
5. The LRA upheld the claim for unfair dismissal and awarded the Respondent compensation for the following reasons set out in its ruling:

Findings

14. The Authority finds in favour of Mrs Castillo-Benjamin in that the process of dismissal was unfair and the reasons given for dismissal were not sufficient to warrant such action.
15. The process was defective in that the investigatory hearing did not address whether it should be put off for Mrs Castillo-Benjamin to attend, did not investigate the complaint of Mrs Thomas and made no findings on that complaint.
16. The reasons given for dismissal were not themselves investigated and Mrs Castillo-Benjamin was not advised that they were being investigated.
17. There was no disciplinary hearing at which Mrs Castillo-Benjamin could argue her case or be accompanied.
18. There was no appeal process.
19. The reasons given for dismissal were not sufficiently serious to warrant such action. They certainly were not gross misconduct of a kind that would warrant immediate dismissal in accordance with s.35 of the Employment Rights Ordinance 2010. There was no need for the ultimate sanction of dismissal when other disciplinary procedures such as written or verbal warnings would have been sufficient.
20. Mrs Castillo-Benjamin had worked from April 2019 until January 2021 without incident. The problem identified by Mr Yon in the dismissal letter was essentially one of employees not getting on with one another impacting on morale and quality of service. A solution was identified by Mr Yon which was to require Mrs Castillo-Benjamin to work at a differing location, unfortunately this was not followed through and a dismissal ensued.
21. The employer has failed to demonstrate that:
 - (a) the principal reason for the dismissal was fair and of a kind such as to justify the dismissal of an employee holding the position which the employee held; (*para 19*)
 - (b) based on the reason referred to in paragraph (a), the employer acted reasonably in dismissing the employee (*para 20*); and
 - (c) prior to the dismissal, the employer properly investigated the situation and followed all steps required by the disciplinary and grievance procedures applicable under section 21(1)(a). (*paras 15-18*)

Ruling

22. The Regulator declares that the dismissal of Mrs Castillo-Benjamin was unfair.
23. In accordance with s.41(2)(c) of the Employment Rights Ordinance 2010 a financial penalty of £200 is imposed. This reflects the failure to:
 - i. hold a disciplinary hearing,
 - ii. establish the facts of the case,
 - iii. inform the employee of the problem,
 - iv. decide fairly on the appropriate action, and
 - v. allow an opportunity to appeal
24. As Mrs Castillo-Benjamin was over 41 years old during her employment period basic award of £398.07 is ordered (2 x 1½ weeks' pay).
25. A compensatory award based upon 1 week's pay of £132.69 is also ordered.

The Law

6. Relevant sections of the Ordinance apply to unfair dismissal in St Helena. Sections 21, 31 and 32 provide for the employer's disciplinary rules to be given to the employee as part of their statement of employment (their contract) and their right not to be unfairly dismissed:

Information on disciplinary and grievance procedures

21. (1) The statement of particulars under section 20 must include a note—
(a) specifying any disciplinary rules applicable to the employee or referring the employee to the provisions of a document specifying such rules which is reasonably accessible to the employee;

(b) specifying—

(i) a person to whom the employee can apply if dissatisfied with any disciplinary decision relating to him or her;

(ii) a person to whom the employee can apply for the purpose of seeking redress of any grievance relating to his or her employment; and

(iii) the manner in which any such application should be made; and

(c) if there are further steps consequent on any such application, explaining those steps or referring to the provisions of a document explaining them which is reasonably accessible to the employee.

(2) Subsection (1) does not apply if on the date the employee's employment began, the employer employed fewer than 10 employees but applies from any date thereafter that the employer employs 10 or more employees.

Employee's right not to be unfairly dismissed

31. (1) Subject to subsection (3), an employee has the right not to be unfairly dismissed by his or her employer.

(2) Any remedy for unfair dismissal available to an employee under this Part is in addition to any claim for wrongful dismissal that the employee may have.

(3) Subsection (1) applies in respect of any employee who has been continuously employed by the employer for a period of at least 12 months ending on the effective date of termination; but this requirement does not apply in the case of the dismissal of an employee referred to in Part C of this Chapter.

Meaning of dismissal

32. An employee is dismissed by his or her employer if—

(a) the employment contract of an employee is terminated, with or without notice by the employer; or

(b) the employment contract of an employee is terminated by the employee in circumstances in which he or she is entitled to terminate it without notice because of the employer's conduct.

7. Section 34 and 35 address fairness of dismissal and gross misconduct and provide:

Fairness of dismissal

34.(1) If an employee alleges that he or she has been dismissed unfairly, it is for the employer to show that—

(a) the principal reason for the dismissal is fair and of a kind such as to justify the dismissal of an employee holding the position which the employee held;

(b) based on the reason referred to in paragraph (a), the employer acted reasonably in dismissing the employee; and
(c) prior to the dismissal, the employer properly investigated the situation and followed all steps required by the disciplinary and grievance procedures applicable under section 21(1)(a).

(2) Fair reasons for purposes of subsection (1)(a) include—

(a) that the employee is not capable with reference to skill, aptitude, health or any other physical or mental quality or does not possess the academic, technical or professional qualification required to perform work of the kind which he or she was employed by the employer to do;

(b) that the conduct of the employee is unsatisfactory;

(c) that the employee could not continue to work in the position which he or she held without contravening (either on his or her part or on that of the employer) a duty or restriction imposed by or under any law;

(d) redundancy of the employee;

(e) retirement of the employee in accordance with the provisions contained in the contract of employment; or

(f) any other substantial reason, including expiry of a fixed term contract.

(3) Failure by the employer to follow or complete any procedures referred to in subsection (1)(c) means that the dismissal is unfair, unless the failure is caused, or substantially contributed to, by the employee's own conduct.

Gross misconduct of employee

35. (1) Regardless of any minimum notice period required under the contract of employment or prescribed by regulations, an employer may, in the case of suspected gross misconduct by an employee, suspend the employment of the employee with immediate effect pending an investigation into the misconduct.

(2) If upon completion of the investigation into the misconduct, it is found that the employee's conduct constitutes gross misconduct, the employer may dismiss the employee with immediate effect.

(3) Gross misconduct for the purposes of this section includes, but is not limited to, theft, fraud or violent behaviour by the employee (whether in connection with his or her employment or otherwise).

8. Sections 41 and 44 provide for the making of claims for unfair dismissal to the LRA and any orders for compensation:

Referral of claim for unfair dismissal to Regulator

41. (1) An employee who claims to have been unfairly dismissed by his or her employer may refer the matter to the Regulator.

(2) The Regulator must determine the matter and if the Regulator finds in favour of the employee, he or she—

(a) must make a declaration to this effect;

(b) may make an award of compensation to be paid by the employer to the employee as provided for in section 44; and

(c) must order the employer to pay a financial penalty not exceeding £200.

(3) *Repealed*

(4) The Regulator must not consider any referral under this section unless it was made within 3 months from the effective date of termination, or a further period the Regulator considers reasonable if satisfied that it was not reasonably practicable for the application to be made within the 3- month period.

Order for compensation

44. (1) Compensation awarded by the Regulator under section 41(2)(b) may comprise—

(a) a basic award calculated in the manner referred to in subsection (2) below; and
(b) a compensatory award which the Regulator considers just and equitable in the circumstances of the dismissal and having regard to the loss suffered by the employee as a result of the unfair dismissal.

(2) The amount of the basic award referred to in subsection (1)(a) must be calculated by—

(a) determining the number of years, ending with the effective date of termination, during which the employee was continuously employed by the employer; and

(b) allowing for each of those years of employment—

(i) one and a half weeks' pay for every year of employment in which the employee was aged 41 years or older;

(ii) one week's pay for every year of employment (not falling within paragraph (i)) in which the employee was aged 22 years or older; and

(iii) half a week's pay for every year of employment that does not fall within paragraph (i) or (ii).

(2A) If the employee was continuously employed for more than 20 years, only the last 20 years of employment must be taken into account for purposes of determining the amount of the basic award under subsection (1).

(3) The amount of the basic award (before any reduction under subsection (4)) must not be more than £5,000 or an amount prescribed by regulations made by the Governor in Council.

(4) If the Regulator finds any factors exist that would justify that the amount of the basic award being reduced to any extent, the Regulator must reduce the amount of the basic award to an extent the Regulator considers just and equitable having regard to that finding.

Jurisdiction of the Supreme Court on an appeal from the LRA

9. Section 46 of the Ordinance provides for the jurisdiction and powers of the Supreme Court when considering an appeal from the LRA against a decision under section 41:

Appeal against order relating to other employee rights

46. (1) An employer or an employee who is dissatisfied with the decision of the Regulator under section 15, 22, 26, 26B, 28, 30, 40(2) or 41 may appeal to the Supreme Court by giving notice in writing within 30 days from the date of the Regulator's order.

(1A) An appeal under this section must be determined on the basis of written evidence (either sworn or unsworn) and submissions, produced and filed in a manner and form prescribed by rules of court.

(1B) If the Chief Justice considers that an oral hearing is necessary in the interests of justice, the Chief Justice may order that a particular appeal must be dealt with at an oral hearing,

- (2) The Supreme Court may uphold the decision of the Regulator or amend the decision and substitute its own decision, and costs will be at the discretion of the Court.
- (3) In amending the decision of the Regulator, the Supreme Court may impose a financial penalty upon an employer not exceeding £400.

The Grounds of Appeal

10. Mr Yon, for the Appellant, argues that the LRA erred in making its finding that the Respondent was unfairly dismissed and that it should pay her compensation. This is for the following reasons set out in his letter dated 3 September 2023.

11. He relied on eight grounds of appeal which are as follows:

1. LRA stated in the ruling that little notice was given of the hearing in relation to the investigation meeting. True, but this matter had to be dealt with as soon as possible due to the nature of it and because she works in the Community Care Complex, my company cannot afford to have this kind of disruption going on where the elderly resides. However, Mrs Castillo-Benjamin informed the person delivering the letter that she would be not be attending the meeting. Her response was that Miss Christabelle Wade, her Lay Advocate would be in touch and her Lay Advocate had advised her that she is not to talk to or say anything to anyone. I did not hear from Miss Wade before the meeting began. If Mrs Castillo-Benjamin in speaking with her Lay Advocate thought that they should be given more notice then they could have made a request to reschedule the meeting but they did not do so. In this case it was not possible to investigate the situation further having categorically chosen not to attend the meeting or even talk to me. Her unwillingness to talk made it very difficult to run a business with contractual obligations, this left no scope to deal with the matter.

2. LRA stated that the nature of the allegation was not clearly specified. This is not true as it was made very clear to Mrs Castillo-Benjamin in the letter the reason for this matter to be investigated and that a meeting was needed to sort the matter out. Mrs Castillo-Benjamin's disrespectful behaviour towards Mrs Thomas on Thursday, 15th July 2021 was totally unacceptable. Mrs Castillo-Benjamin was aware of the incident, and was given every opportunity to seek clarification and indeed any other matter she was not happy with.

3. LRA stated there was no consideration of delaying matters to enable Mrs Castillo-Benjamin to reflect on her refusal to attend or to seek legal advice. Mrs Castillo-Benjamin could have at that point involved her Lay Advocate, which would have been one of the ways in which the matter could be resolved, but this did not happen. Her attitude was totally unacceptable. As her Employer, I thought it was disrespectful that Mrs Castillo-Benjamin did not contact me directly to inform me that she would not be attending the meeting for whatever reasons. Had she telephoned me, I could have discussed the reasoning behind her not wanting to attend the meeting and then attempt to deal with the matter from there.

4. LRA stated there was no information received from Mrs Thomas about what happened on the 15th July 2021 despite the meeting being convened to investigate it. I refer to the File Note that was written by Mrs Thomas detailing her account of the incident that took place on 15th July 2023. As I had already received a report from Mrs

Thomas regarding her account of the incident, the meeting was convened so both parties would have an opportunity to defend themselves. With Mrs Castillo-Benjamin absence this could not happen. Therefore as mentioned earlier, with no direct communication from either Mrs Castillo-Benjamin or her Lay Advocate before or after the scheduled time for the meeting and upon advice of my legal representative, I took the decision to terminate Mrs Castillo-Benjamin's employment with Ambledale Cleaning Serviced Ltd.

5. LRA stated that the minutes of the meeting record that the Chairman Mr Yon stated that 'because we are not able to hear Mrs Castillo-Benjamin's side of things he would not terminate her employment at this point, but he would most likely take the decision to move her to work at another government property.' This was not a final decision, it was suggested that this might be something that could be done. Before terminating Mrs Castillo-Benjamin, consideration of a possible transfer to another job was possible, however, at the time options were limited. Also, no complaints were received regarding other employees' performance, therefore to relocate other employees to accommodate Mrs Castillo-Benjamin seemed not to be fair.

6. As regards the appeal process, I can see where I failed in this regard, however Mrs Castillo- Benjamin was informed of the 'problem' through her termination letter, if she believed the contents not to be accurate or unfair then she could have contacted me as she was advised to do.

7. This is not the first time Mrs Castillo-Benjamin had to be spoken to with regard to her attitude towards her colleagues in not being able to put past grievances behind her and move forward. As a Supervisor she is expected to lead by example and maintain professionalism at work. Also, her attitude towards management notably the incident that occurred on the 26th June 2021 when Mrs Castillo-Benjamin was off sick and did not make any arrangement to ensure that the keys in her possession were sent in and it took time to get them from her. She was obviously very reluctant to hand them over. Afterwards it was found that she had not given me all the keys the first time when I went to collect them. She claimed that the keys she kept back were copies but they were not. A meeting was convened on her return to work, amongst the issues that was discussed, was the reason why she was so reluctant to hand the keys over.

8. Mrs Castillo-Benjamin was advised that there was no option but for her to be demoted and the reasons given. Her response to which can only be described as most rude and disrespectful. Mrs Benjamin was also advised that her performance at work was not acceptable; and this was not first time she had to be told - it had also been reported by her line manager that methods she used in cleaning such as mopping the floor without first sweeping is not conducive to provide the appropriate cleanliness required by the contractor in providing cleaning services in Care Homes for the elderly. The Company does have contractual obligations to fulfil in providing this service.

12. In his oral submissions Mr Yon expanded upon these grounds emphasising that the Respondent had been fairly and properly treated in light of her behaviour, and that the Appellant and he had done nothing wrong but behaved reasonably. He argued that he had been badly advised and had been a reasonable employer in circumstances where it is difficult to find employees on island. He also argued that the claim had taken too long to come to be decided and that this was in breach of his human rights.

Discussion: - consideration of the grounds of appeal

13. I am not satisfied that any of the eight written grounds of appeal give rise to any error of fact or law in the LRA's decision that the Respondent had been unfairly dismissed.
14. Grounds 1 and 3 of the Appellant's submissions accept the concerns that the Labour Regulating Authority sets out at paragraph 7 of the ruling about the very short notice given to the Respondent on 20 July 2021 before the investigatory meeting on 21 July 2021. The Appellant seeks to justify why he continued with the course of action he did, placing responsibility for his actions onto the Respondent. The Respondent had instructed a Lay Advocate regarding her employment with the Appellant. The Appellant was aware of this, having received a letter from the Respondents Lay Advocate on 12 July 2021 regarding the Appellant demoting the Respondent without following formal process. Reasonable alternative actions could have been taken, instead the Appellant chose to terminate the Respondent's employment. Despite promising in the letter dated 20 July 2021 that there would be a hearing to follow the investigatory meeting if disciplinary action was to be considered, none took place.
15. In response to Ground 2, the Appellant has not identified any error in the LRA's findings at paragraphs 7 of its ruling. The Respondent did not receive any particulars or details of the nature of the allegation which clearly specified the matters relied upon or gave her fair notice. The letter dated 20 July 2021 simply states that the allegation was 'of your disrespectful behaviour'. The Appellant states that the behaviour was totally unacceptable but this was concluded in the absence of any investigation, evidence from Mrs Thomas or any finding at the hearing on 21 July 2021. Further, the submission that the Respondent was aware of the incident and was given every opportunity to seek clarification is not accepted. The letter was delivered in the afternoon before the meeting. The Respondent's employment was terminated the following day. This ground of appeal does not give rise to any error in the LRA's decision.
16. Grounds 4 and 5 do not give rise to any error in the LRA's findings at paragraphs 15-17 of its ruling. It was entitled to find that there was no investigation or findings in relation to the incident on 15 July 2021 at the meeting on 21 July 2021 nor the hearing of any evidence from Mrs Thomas. The fact that there may have been a file note of the incident on 15 July 2021 does not alter these facts. There is nothing within the minutes of the meeting dated 21 July 2021 that suggest that the file note was considered at the meeting or formed part of the disciplinary process. Despite the minutes of the meeting recording a decision was taken not to terminate the Respondent's employment but most likely move her location, that decision was then changed later that day to dismissing her. This change of decision was made without explaining why the previous reasoning - that the Respondent's employment should not be terminated when the Appellant had not heard 'her side of things' - no longer applied.
17. Ground 6 does not give rise to an error of fact or law in the LRA's decision. It was entitled to find, for the reasons it gave at paragraphs 15-21 of its ruling, that there had not been a fair process leading up to the dismissal, there was no right of appeal against it and that the reasons and conduct relied on by the Appellant did not justify a finding of gross misconduct or termination of the Respondent's employment.

18. Grounds 7 and 8, relating to matters taking place before 15 July 2021, do not form part of the Labour Regulating Authority's Ruling and these matters were not relied upon in support of the dismissal. They are therefore irrelevant to this appeal. In any event, whatever the Respondent's behaviour in June or early 2021, this would not undermine or demonstrate any error of fact or law in the LRA's findings and conclusions at paragraphs 15-21 of its ruling in relation to the events on 20-21 July 2021.
19. I am satisfied that none of the Appellant's oral arguments give rise to any error in the LRA's ruling and decision. The Respondent's claim was made within the three-month period for lodging a claim (on 21 October 2021) and there was no breach of the Appellant's or Mr Yon's human rights or constitutional rights in it not being determined until July 2023. The case has been concluded within a reasonable length of time, even if not as quickly as may have been hoped. While I have sympathy for Mr Yon if he believes he has been badly advised at the time or subsequently or placed in a difficult position as an employer, he has had a reasonable and fair opportunity to present his case before the LRA and before me.
20. The grounds of appeal do not demonstrate that when determining the claim, the Labour Regulating Authority failed to interpret or apply the relevant law correctly. The Employment rights Ordinance places the burden upon the Employer to demonstrate the fairness of dismissal, the reasons for and process followed, when an Employee alleges unfair dismissal. The LRA made findings of fact and evaluative judgments that it was reasonably entitled to make on the evidence before it and gave sufficient reasons for its decision at paragraphs 15-21 of the ruling. The LRA did not take into account relevant evidence or fail to take into account relevant evidence. It made no mistake of fact.
21. In light of the foregoing, I am satisfied that the Labour Regulating Authority properly interpreted and directed itself to the relevant law and applied it to the facts it reasonably found. There is no error of fact or law in the LRA's ruling and decision. I uphold them.
22. The Appellant's appeal is dismissed.

Rupert Jones, The Chief Justice

7 December 2023