ANTIGUA and BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.11 of 1994

BETWEEN:

DIANE CAMACHO

Appellant

and

CAMACHO and SONS LIMITED

Respondent

Before:

The Hon. Mr. C.M. Dennis Byron	Chief Justice (Ag.)
The Hon. Mr. Satrohan Singh	Justice of Appeal
The Hon. Mr. Albert N. J. Matthew	Justice of Appeal (Ag.)

Appearances: Miss J. Kentish for the Appellant
Mr. D. Hamilton for the Respondent

1996: November 14; 15;
December 9.

JUDGMENT

MATTHEW J. A. (Ag.)

The facts pertaining to this appeal arose out of an incident which occurred on Sunday January 3,1993 at the home of Rose Camacho, the Managing Director of the Respondent company and the mother-in-law of the Appellant.

Rose alleged that on that day the Appellant together with her mother, sister and daughter visited her home and after the Appellant had asked her for the keys to one of the company's two shops in Antigua and Rose responded that the keys were with her lawyer, the Appellant assaulted her while screaming AI am going to kill you, I am going to kill you. Two days later the Appellant was dismissed from the companys employment.

Perhaps it is necessary to give a little background as to the relationship between the Parties. The Respondent operates at a store situate at the corner of Thames Street and High Street and at another store at the V. C. Bird International Airport. The stores are referred to as Scent Shops and they traded in the sale of watches, perfumes, jewellery and other goods.

The business originally was run jointly by Rose Camacho, the founder, and her son Robert Ca macho. Robert Ca macho subsequently married the Appellant on August 21, 1976 and she later assumed duties in the Scent Shop at the corner of Thames Street and High Street together with her husband.

It would appear that Rose's main responsibility was at the Scent Shop at the airport. Unfortunately Robert died suddenly on April 23, 1987 and this occasioned the Board to appoint the Appellant as a Director of the company. It seems as though the Appellant worked mainly or exclusively at the Scent Shop in St. Johns.

At the relevant time the Respondent had a Board of Directors with Rose being the chairman. The Appellant was a director and Rose's other daughter-in-law was a director. The secretary was Mary Street, Rose's niece.

As a result of her dismissal the Appellant referred this case to the Industrial Court on April 20, 1993 filing at the same time the Employee's Memorandum in which it is contended that the employee's dismissal was unfair. On May 9, 1993 the Employer filed the Employer's Memorandum to the contrary. In a majority judgment dated July 22, 1994 two members of the Court dismissed the employee's reference. The dissenting member of the Court did not give a written judgment.

In her notice of appeal to this Court filed on September 9,1994 the Appellant gave six grounds of appeal and at the hearing learned Counsel for the Appellant was granted leave to amend the notice of appeal by adding three additional grounds. Ground 6 is that the decision of the Industrial Court is unreasonable and cannot be supported having regard to the evidence as a whole. Counsel did not proceed to argue that ground of appeal. I propose to deal firstly, with grounds 3 and 4 together, then secondly, with grounds 1, 2, 5 and 9 together, and thirdly, with the additional grounds 7 and 8 together, in very much the same order as they were argued. Finally, I shall say something about the Respondent's cross appeal.

Grounds 3 and 4

Grounds 3 and 4 of the appeal are as follows:

> "(3) The Court fell into error in failing to make a finding as to the factual basis for the Employer's termination of the Employee's employment as prescribed by the Antigua Labour Code having regard to the reasons advanced by the Employer in its memorandum and the evidence as a whole.
>
> (4) The Honourable Court failed to evaluate and assess the inconsistent and contradictory testimony of the Employer and thereby failed to make a determination as to what part of the Employer's testimony it accepted and relied upon as constituting just cause for dismissal.

Under these heads learned Counsel for the Appellant submitted that the allegations in the Employer's Memorandum were not specifically proved and the Court could not make such a specific finding because of the variations of the scenario as testified by Rose. Counsel referred to the fact that Rose said under cross-examination that Diane did not throw a chair at her as stated in the Employer's Memorandum but that the chair struck her as Diane picked it up. Counsel also referred to the fact that under cross-examination Rose said she got a blow on her wrist and left shoulder but that is not so specified in the said Memorandum.

Learned Counsel for the Respondent submitted in response that the majority of the Court came to the conclusion that an assault had taken place on the day in question and there was ample evidence for such a finding.

Counsel submitted that there was no material variation between the evidence given by Rose upon examination-in-chief and her evidence given under cross-examination.

To come to a conclusion on these submissions one must carefully examine the Employer=s Memorandum and the notes of evidence. This was stated in **Cable & Wireless [West Indies] Ltd. v Hill and Others (1982) 30 W.I.R. 120.** At page 129 of that case Berridge J. A. who delivered the judgment of the Court said:

> "The Court held that, within the ambit of Section C58 of the Labour Code, the burden of proof was on the company to show 'just cause' for dismissing the employees and that since summary dismissal constituted a 'strong measure' the standard of proof should be strict, persuasive and convincing. Further, notwithstanding the fact that this is a matter of

> civil nature requiring proof on the balance of probabilities, since the matters to be proved were of a grave and weighty nature, it would expect the evidence to be correspondingly cogent and weighty in nature and content."

In this case there was evidence by the Appellant and her sister denying the allegations of Rose Camacho. According to them no incident took place and everything went well. Rose is the only witness for the employer as to what took place, but in my view her evidence is well supported by circumstantial evidence from her grandson, Sean Camacho, who was away from the scene for only about twenty to thirty minutes and also by the evidence of Peter Abraham and Corporal Byron Weekes.

Looking at the evidence as a whole I do not share the view that the testimony of Rose bears such inconsistencies arid contradictions which would render her evidence unreliable or her credit worthiness doubtful.

Learned Counsel for the Appellant drew attention to the fact that the testimony of the Appellant and her witness had not been contradicted. In **Industrial Chemical Co. (Jamaica) Ltd. v Ellis 1982 35 W.I.R. 303, P.C.** Lord Oliver of Aylmerton who delivered the judgment of the Board stated at page 310:

> "With respect, their Lordships consider that this was a quite impermissible conclusion and on two grounds. First, it rests upon the fallacy, sometimes propounded from the Bar, that because the sworn testimony of a witness cannot be directly contradicted by that of another witness or by contemporary documents, it must necessarily be accepted as truthful by the judge regardless of his assessment of the credibility of the witness."

The second matter referred to in the speech by Lord Oliver dealt with the principles upon which an appellate court has to approach the task of reviewing the trial judge's findings of fact and that will be referred to later on in this judgment.

I find that the decision of the majority of the Court was supported by the evidence before the Court. I find too that there was enough factual basis for the decision. It is true the Court did not specifically say they found that Diane struck Rose with a chair as is the traditional arid safer method for Courts to say. Their approach was to state the claims of both Parties and then afterwards to conclude that the evidence of Rose Camacho was more truthful. They came to the conclusion that Diane assaulted Rose and they found that was misconduct which justified the termination.

A number of cases were cited which elaborate the reluctance of the Court of Appeal to interfere with facts found by a trial judge and it is only necessary to list them:

Watt v Thomas 1947 1 AER 582 H.C; 583 - 584

Caldeira v Gray 1936 1 AER 540; 541 - 542

Sumair Singh v Chase Manhattan Bank S.A. 1991 45 WIR 220; 222

Adolphus v Popper (1986) 39 WIR 76.

I adopt and follow the wisdom of these cases.

In **Ward v McDonald's Restaurant 39 D.L.R.** 469 in the Supreme Court of British Columbia, McKinnon J. held that Aand conduct, at home or at work, can be justification for dismissal if it is prejudicial to the best interests of the employer.

I am of the view that the conduct of the Appellant on Sunday January 3,1993 was improper and was such to be detrimental to the best interests of the Respondent so as to justify summary dismissal of the Appellant. I would dismiss both grounds of appeal.

Grounds of Appeal 1,2,5 and 9

Grounds 1, 2, 5 and 9 of the appeal are as follows:

"(1) The Honourable Court erred in failing to make a finding in relation to the reasons for the dismissal advanced by the Employer in its Memorandum and consequently the Court erred in law in finding that the Employee's dismissal was fair.

(2) The Court misdirected itself and fell into error in basing its decision that the dismissal of the Employee was justified purely on a finding that some form of attack was made by the Employee upon Rose Camacho when such finding is by its nature vague, speculative and a matter of conjecture.

(5) The Honourable Court erred in law in founding its decision that the Employee's dismissal was justified upon speculation rather than on decisive findings of fact arrived at upon reasoned consideration of the evidence as a whole.

(9) The Industrial Court erred in law and in fact in failing to find that

the Employee had been unfairly dismissed."

Some of these grounds are incorporated in grounds 3 and 4 and I have said enough above which renders it unnecessary to deal with those grounds of appeal and for the reasons given above these four grounds of appeal are also dismissed.

Grounds 7 and 8

Grounds 7 and 8 are as follows:

"(7) Having found as a fact that the Appellant was an Employee the Honourable Court was equivocal in its finding as to when the Applicant's term of employment commenced.

(8) The Honourable Court misdirected itself in failing to find as a fact that the Employee's term of employment with the Respondent commenced in September 1976 having regard to the evidence as a whole."

The contention of the Appellant in her evidence before the Industrial Court was that she commenced employment with the Respondent company in September, 1976. In the majority judgment of the Court they came to the conclusion that the Appellant was an employee "at any rate from 11th January, 1990."

In the course of the arguments before this Court and in answer to me learned Counsel for the Appellant stated that the significance of the commencement date of the employment is related to the amount of compensation that would be due to the Appellant. In view of my finding above that the Appellant was not unfairly dismissed the commencement date of the employment is relegated to insignificance.

Cross Appeal

In its cross appeal filed on December 7,1994 the Respondent gave notice that it would ask the Court that in the event of the appeal being allowed in whole or in part the decision of the Court below should be varied by substituting a finding that the complaint was not brought in accordance with the Industrial Court Act. Since the appeal is not being allowed in whole or in part then perhaps it becomes unnecessary to deal with the cross appeal. However, I should like to express my view on the jurisdictional point submitted

in respect of the appeal.

The submission of the Respondent is that all proceedings before the Industrial Court should be commenced by a reference under Section 19 of the Industrial Court Act and that there is no authority for commencing proceedings by referring a complaint to the Court.

Early in their judgment the Industrial Court stated:

> "This case was referred to the Court on 29th April, 1993, by solicitors for the Employee who simultaneously filed the Employee's Memorandum."

Later in the judgment the Court dealt with the issue of jurisdiction and found that under Section 7(1) (c) it did have jurisdiction to deal with complaints as well as other employment and industrial relations matters apart from trade disputes.

Section 7 of the Industrial Court Act defines the jurisdiction of the Court. In particular Section 7(1) is as follows:

> "The Court shall have jurisdiction -
> (a) to hear and determine trade disputes referred to it under this Act;
> (b) to enjoin a trade union or other organisation of employees or other persons or an employer from taking or continuing industrial action;
> (c) to hear and determine any complaints brought in accordance with this Act as well as such matters as may from time to time be referred to it under this Act."

Section 19 of the Act describes in some detail the trade dispute procedure and briefly it makes provision for either the Minister to refer a matter to the Court; or for a party to a trade dispute to refer a matter to the Court if within 10 days after the existence of a trade dispute has come to the attention of the Labour Commissioner he fails to achieve a voluntary adjustment or settlement of the trade dispute.

It will be noticed that there is no direct reference of a trade dispute to the Court by an Employee or Employer.

Section 4 (8) of the Act would seem to indicate the relative importance of the trade dispute procedure over the hearing of other matters. The subsection states that when hearing a trade dispute the Court shall be constituted of two or more members but when hearing any other matter it shall be constituted of one or more members.

The Industrial Court founded its jurisdiction under Section 7 (1) 8 because they formed the view that if the Legislature had intended the Court to deal only with trade disputes it would have completed Section 7 (1) at the end of paragraph (a). In my view Section 7 (1) (c) does not give the Court a "carte blanche" jurisdiction to deal with all complaints, but only complaints "brought

in accordance with this Act." I am not able to see any provision in the Act which permits the Employee to bring complaints to the Industrial Court. I see two provisions which permit proceedings to be brought to the Court apart from section 19. One such provision is Section 15 which provides for interpretation of orders, awards and collective agreements. Section 15 is as follows:

"Interpretation of orders, and collective agreements.

115. (1) Where any question arises as to the Interpretation of any order or award of the Court, the Minister or any party to the agreements. matter may apply to the Court for a decision on such question and the Court shall decide the matter either after hearing the parties or, without such hearing, where the consent of the parties has first been obtained. The decision of the Court shall be notified to the parties and shall be binding in the same manner as the decision on the original order or award.

(2) Where there is any question or difference as to the interpretation or application of the provisions of a collective agreement any employer or trade union having an interest in the matter or the Minister may make application to the Court for the determination of such question or difference.

(3) The decision of the Court on any matter before it under subsection (2) shall be binding on the parties thereto and is final."

The other provision is Section 26 (2) which permits any person, trade union or other organisation or employer to bring a complaint to the Court. The entire Section is as follows:

> "On whom award to be binding.
>
> 26(1) An award of the Court shall be binding on -
>
> (a) all parties to the trade dispute who appear or are represented before the Court;
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> (b) all parties to the trade dispute who have been summoned to appear as parties to the dispute whether they have appeared or not;
>
> (c) in the case of employers, any successor to, or any assignee of, the business of the employer who is a party bound by the award, including any company which has acquired or taken over the business of such a party;
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> (d) all trade unions or other organisations on whom the award is at any time declared by the Court to be binding, as well as on their successors, and
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> (e) all employees employed by their employers who are bound by the award or the successors or assignees of such employers.
>
> (2) Any person, trade union or other organisation or employer bound by an order or award may at any time during the continuance of such order or award complain to the Court of the manner in which the award is being administered or of any infringement or breach of the terms of such order or award; and the Court may hear and determine every such complaint in the manner prescribed for the hearing and determination of trade disputes and may make such order or give such directions as the justice of the case may require."@

It seems to me that to get to the Court in relation to a matter such as the present one the Appellant would need to be armed with a reference under Section 19 of the Act and in my judgment the Industrial Court has no jurisdiction to entertain a complaint directly from an Employee or Employer.

For the reasons given above the appeal is dismissed, and there being no exceptional reasons as required by Section 10 (2) of the Act, I make no order as to costs.

A.N.J. MATTHEW
Justice of Appeal (Ag.)

BYRON, JA.

I concur with the dismissal of the appeal. I have the same reservations expressed by Justice of Appeal, Satrohan Singh.

C.M. DENNIS BYRON
Chief Justice (Ag.)

SATROHAN SINGH, J.A.

I agree with Matthew, J.A. (Ag.) that this appeal should be dismissed. At this time however, I would not wish to express an opinion on the cross appeal for two reasons: (1) the said cross appeal states that the respondent only intended to prosecute same if the appeal was partially or totally successful and (2) the matters raised therein were not fully or properly ventilated before us. As it turned out the appeal was dismissed.

SATROHAN SINGH
Justice of Appeal