TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2008/010

BETWEEN:

BRYON SMITH

Appellant

and

BRITISH VIRGIN ISLANDS ELECTRICITY CORPORATION

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins	Chief Justice
The Hon. Mde. Ola Mae Edwards	Justice of Appeal [Ag.]
The Hon. Mde. Indra Hariprashad-Charles	Justice of Appeal [Ag.]

Appearances:

Sir Richard Cheltenham, QC for the appellant
Ms. Willa Tavernier for the respondent

2008: September 23;
2009: January 12.

Civil Appeal – Employment Law – remedy – unfair dismissal – right of access to the court – whether an employee can initiate an unfair dismissal claim for damages or compensation in the High Court – British Virgin Islands Labour Code Ordinance

The appellant, Mr. Smith, was employed by the respondent corporation ("the Corporation") as an electrical engineer from June 1994 to June 2001. By letter of 20th June 2001, Mr. Smith was summarily dismissed for insubordination. Pursuant to the provisions of the Labour Code Ordinance, he invoked the assistance of the Labour Commissioner and the responsible Minister, but to no avail. In June 2007, he commenced proceedings against the Corporation claiming damages and/or compensation for wrongful and/or unfair dismissal. The Corporation applied to have these proceedings struck out as disclosing no reasonable cause of action. The learned master struck out Mr. Smith's claim for unfair dismissal on the ground that conciliation is the only "remedy" for unfair dismissal under the provisions of the Labour Code so that there was no right of action which could be redressed in the High Court. Mr. Smith applied for leave to appeal the decision of the learned master and the court agreed to treat the application for leave as the appeal itself.

Held: dismissing the appeal and awarding costs to the Corporation:

1. Unfair dismissal does not exist as a concept at common law but was created and introduced into the field of employment law by statute. Under the Labour Code, the only "remedy" available to an employee who has been unfairly dismissed is conciliation.

   Ray George v British Virgin Islands Ports Authority British Virgin Islands Civil Appeal No. 28 of 2006, which considered and applied Burrill & Another v Schrader and Another (1995) 50 WIR 193, followed.

2. The court cannot disregard the legislative intention to restrict a subject's right of access to the court whether or not the new statutory procedures appear to be inadequate or unsatisfactory.

   Kenneth Suratt v Attorney General of Trinidad & Tobago (2008) 1 AC 655 and Banks v Executive Airlines (1999) 60 WIR 227 followed.

JUDGMENT

[1] HARIPRASHAD-CHARLES, J.A. [AG.]: The sole issue that the proposed appeal by the appellant, Bryon Smith (the claimant in the court below) raises is whether an employee can initiate an unfair dismissal claim for damages or compensation as a remedy in the High Court. Mr. Smith applied for leave to appeal against the learned master's decision to the effect that he could not initiate such a claim and this court agreed to treat the application for leave as the appeal itself.

[2] Mr. Smith was employed by the British Virgin Islands Electricity Corporation ("the Corporation") as an electrical engineer from 1st June 1994 to 21st June 2001. By letter dated 20th June 2001, he was summarily dismissed for insubordination. He alleged that the Corporation dismissed him because he failed to accept an offer to be transferred from the island where he was employed at the time he entered into his contract of employment to another island in the British Virgin Islands on terms and conditions which were unsatisfactory to him. Pursuant to the provisions of the

Labour Code Ordinance[1], he invoked the assistance of the Labour Commissioner and the responsible Minister but to no avail.

[3] Section C55 of the Labour Code expressly provides that an employee has a statutory right not to be unfairly dismissed while section C57 identifies reasons that would not make a dismissal unfair. Section C59 deals with initiation of proceedings by an employee who questions whether he has been unfairly dismissed. It permits him to seek a resolution of the question by filing a Complaint of Unfair Dismissal with the Labour Commissioner. Section C60 sets out the procedure that the Labour Commissioner shall employ immediately upon the receipt of the complaint while section C61 provides for the intervention of the Minister to seek to achieve a voluntary adjustment or settlement of the issues if the Labour Commissioner failed to achieve such voluntary adjustment or settlement.

[4] Mr. Smith alleges that his summary dismissal amounts to unfair dismissal under the Labour Code. Consequently, in June 2007, he commenced these proceedings against the Corporation claiming damages and/or compensation for wrongful and/or unfair dismissal. By notice of application dated 28th September 2007, the Corporation applied for an order that certain portions of the pleadings which claim damages and/or compensation for unfair dismissal be struck out as disclosing no reasonable cause of action.

[5] On 29th May 2008, the Learned Master struck out Mr. Smith's claim for unfair dismissal on the grounds that she was bound by the decision in Ray George v British Virgin Islands Ports Authority[2] which held that conciliation is the only "remedy" for unfair dismissal under the provisions of the Labour Code. She opined that Mr. Smith has no right of action which could be redressed in the High Court.

[6] Mr. Smith has challenged the decision of the Learned Master. Both Counsel focused their arguments at the hearing on the merits of the proposed appeal rather

[1] See C59, C60 and C61 of Cap. 293 of the Revised Laws of the Virgin Islands, 1991.
[2] British Virgin Islands Civil Appeal No. 28 of 2006 – Judgment delivered on 2nd July 2007 [unreported].

than on the application for leave. It is, accordingly, appropriate for me to consider the merits of the proposed appeal and by that determination dispose of both the application and the appeal. Mr. Smith's proposed grounds of appeal are that:

> "(1) The Master was wrong to follow Ray George as that decision wrongly denies a victim of unfair dismissal access to the High Court for contravention of a statutory right whereby the victim of the contravention suffers loss and/or damage and (2) Ray George was wrongly decided as the Court of Appeal was bound by its own previous decision in Burrill and Another v Schrader and Another.[3]"

[7] In a nutshell, Learned Queen's Counsel, Sir Richard Cheltenham appearing for Mr. Smith submitted that since the Labour Code has granted the statutory right to an employee not to be unfairly dismissed, then the employee must have a right of access to the High Court to enforce that right unless Parliament expressly provides otherwise. He asserted that where there is a right, there is a remedy and once Parliament has created a right, the court will give a remedy. According to Sir Richard, conciliation is not a remedy and a Labour Commissioner or a Minister who tries to conciliate is not a court or tribunal.

[8] Mrs. Tavernier appearing as counsel for the Corporation objected to the granting of leave to appeal. The essence of her arguments is that the master was correct in striking out the claim for unfair dismissal in the High Court as she was bound to follow the decision of the Court of Appeal in Ray George which decided and exhausted the very issue. She also argued that there is no conflict between Ray George and Burrill and that Ray George is correct in law.

The decision in Ray George

[9] In Ray George, the appellant claimed damages for breach of contract and/or damages for unfair dismissal. The matter came before the master on an application by the respondent to strike out the claim. The master ordered, among other things, that:

> "(i) the dismissal clause in the contract of employment was valid, thus there was no breach of contract;

[3] (1995) 50 WIR 193.

(ii) the claim for wrongful dismissal is struck out and the claim for unfair dismissal is allowed to continue, and

(iii) in order to continue the claim for unfair dismissal, the claimant must follow the procedure set out in the Labour Code. On appeal, the appellant argued that the master was wrong to hold that he must first obtain a determination from the Minister that he had been unfairly dismissed under the Labour Code before coming to the High Court to sue for damages. The respondent contended that the master erred in holding that the appellant could obtain damages for unfair dismissal once he obtained a determination of unfair dismissal in proceedings under the Labour Code."

[10] The Court of Appeal therefore had to determine the extent of the right not to be unfairly dismissed. Barrow, J.A., in delivering the judgment of the court said:

> "Unfair dismissal does not exist as a concept at common law but was created and introduced into the field of employment law by statute."[4]

[11] After considering the judgment of Sir Vincent Floissac, C.J. in **Burrill**, Barrow, J.A. declared[5]:

> "It seems to me that decision definitely answers the question raised by and exhausts the present appeal. Under the Labour Code conciliation is the only "remedy" for unfair dismissal…The decision of Floissac, C.J. clearly confirms that the respondent is right in arguing that unfair dismissal does not give any separate cause of action for damages and any other remedy."

[12] To sum up, **Ray George** decided that the only "remedy" available to an employee who has been unfairly dismissed is conciliation. Learned Queen's Counsel for Mr. Smith argued, among other things, that since the Court of Appeal in **Ray George** did not follow its own previous decision in **Burrill**, the decision in **Ray George** is erroneous. It is from this standpoint that I propose to examine the Court of Appeal decision in **Burrill**.

The decision in Burrill v Schrader

[13] The facts in **Burrill** are unnecessary in resolving the issue in this appeal. However, it is useful to examine the issues which arose in **Burrill** since Sir

[4] See paragraph 15 of the judgment.
[5] At paras 18 and 19

Richard trenchantly argued that the Court of Appeal clearly decided that the procedure by conciliation is optional thus leaving it open to the employee to pursue the right of access to the High Court to seek redress for contravention of the right not to be unfairly dismissed.[6]

[14] The issues which arose in **Burrill** were succinctly stated by Sir Vincent Floissac, C.J.[7]:

> "The issues in this appeal are (1) whether an employee's exhaustion of the procedure for conciliation prescribed by sections C59, C60, C61 and B6 of the Labour Code is a pre-requisite to the employee's recourse to the courts for the vindication and enforcement of the employee's rights, and (2) whether the appellants are entitled to judgment in their favour on the counterclaim.
>
> …the first question required to be decided in this appeal is whether the Labour Code unequivocally discloses a legislative intention to make the exhaustion of the procedure for conciliation a pre-requisite to the employee's recourse to the courts for remedies for breaches of the employee's common-law and statutory rights and thereby to restrict the employee's right of access to the courts for those remedies. In other words, the first question to be decided is whether sections C59, C60, C61 and B6 of the Labour Code are mandatory in the sense that the procedure for conciliation thereby prescribed cannot be waived and that any legal proceedings instituted by an employer or an employee before exhausting that procedure are null and void or premature."

[15] The appellants in **Burrill** had a claim for damages for wrongful dismissal/breach of contract. But the Court of Appeal had to go a step further to decide whether statutory conciliation proceedings were a pre-requisite to that claim being brought. Sir Vincent Floissac, C.J. held that there was no such pre-requisite when he said[8]:

> "…I conclude that the appellants' exhaustion of the procedure for conciliation prescribed by the Labour Code was not a pre-requisite to the exercise by the appellants of their common-law rights of access to the High Court for the purpose of procuring remedies for breaches of their common-law rights not to be wrongfully dismissed and their statutory rights not to be unfairly dismissed."

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[6] See page 5 of the appellant's skeleton argument filed on 8 September 2008.
[7] At pages 196 and 198
[8] At page 200

[16] Later on in the judgment, his Lordship went on to find that the appellants had not sought a remedy for unfair dismissal. He said[9]:

> "Although the appellants alleged in their defense and counterclaim that they were wrongfully and unfairly dismissed, the appellants' counterclaim against the respondents was for damages for breach of contract. The cause of action relied on by the appellants was therefore breach of contract or breach of the appellants' common-law rights not to be wrongfully dismissed."

Is there a conflict between the decisions of the Court of Appeal in Ray George and Burrill?

[17] Learned Queen's Counsel, Sir Richard argued that the decisions in **Ray George** and **Burrill** are in conflict on the question of whether Mr. Smith could be denied redress for unfair dismissal in the High Court because the only procedure available to him is conciliation under the provisions of the Labour Code. He then submitted that **Burrill** left the option open to the employee to pursue the right of access to the High Court to seek redress for contravention of the right not to be unfairly dismissed which he argued, may not in law be hindered or impeded unless by clear and unambiguous statutory provisions. Sir Richard relied on a plethora of judicial authorities in support of the proposition.[10]

[18] On his own submissions, Sir Richard conceded that the decision in **Burrill** left the question open and did not decide whether there is a right of access to the High Court to seek redress for contravention of the right not to be unfairly dismissed. As such, there is no judicial finding in **Burrill** constituting binding precedent on the issue of whether there was a cause of action in damages for redress of an employee's right not to be unfairly dismissed. Consequently, there is no merit in Sir Richard's submission that the decision in **Ray George** is "contrary to the law relating to precedent."

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[9] At page 201

[10] See Attorney General v Times Newspapers [1973] 3 All ER 54, 72 –per Lord Diplock; Pyx Granite Co Ltd v Ministry of Housing [1959] 3 All ER 1, 6 – per Viscount Simon, Burrill v Schrader [supra]; Kenneth Suratt v The Attorney General of Trinidad & Tobago [2008] 1 AC 655.

[19] It is also interesting to observe that in **Burrill**, Sir Vincent stated[11]:

> "The Labour Code Ordinance provides no remedy by way of compensation for an employer's breach of his employee's statutory right not to be unfairly dismissed. The Labour Code merely provides for conciliation which I would hesitate to classify as a remedy."

[20] Moreover, it is plain that **Burrill** did not establish that there was a cause of action for damages or any other remedy for unfair dismissal. It is also plain that the Court of Appeal in **Ray George** was fully cognizant of the issues and findings in **Burrill** in coming to its decision that there was no such cause of action in damages for unfair dismissal. The court had the benefit of comprehensive submissions on the identical issue raised in this appeal. In the end, the court did not find that its earlier judgment in **Burrill** had decided the issue raised in **Ray George** and therefore, there was no conflict with its earlier judgment in **Burrill** in coming to its decision in **Ray George**.

[21] As I see it, there is no conflict between the decisions of the Court of Appeal in **Ray George** and **Burrill**.

Right of access to the High Court

[22] Sir Richard contended that the decision of the learned master in this case and the Court of Appeal decision in **Ray George** contravened his client's right of access to the High Court. He did however acknowledge that the right of access can be proscribed by clear statutory provision.[12] In my judgment, the decision in **Ray George** does not contravene a subject's right of access to the courts but gives credence to the legislative intention to restrict such access. In fact, the decision is in concordance with the Privy Council case of **Kenneth Suratt v Attorney General of Trinidad & Tobago**[13] where the Board found, in relation to certain new rights created by the statute that:

> "The decision could have been taken to increase the jurisdiction of the High Court to deal with these new claims, but for the very understandable

[11] At page 198
[12] See page 3 of appellant's skeleton argument on "the right of access to the High Court."
[13] [2008] 1 AC 655 at paragraphs 44 and 50 of the judgment.

> and sensible reasons it was thought that a new and specialist body would be preferable…This is definitely not "part of the jurisdiction that is characteristic of a Supreme Court." The subject matter, as already mentioned, was not traditionally the subject of adjudication at all…"

[23] The court cannot disregard the legislative intention whether or not the new procedures appear to be inadequate or unsatisfactory. In Suratt[14], protections were not put in place to guarantee the independence of the adjudicators from the executive and legislature. In Banks v Executive Airlines[15], there was no power to make an award for the unfair manner of dismissal. In both of these cases, the courts found that these matters were not justifiable.

[24] For all of the above reasons, I am of the view that the learned master was correct in striking out the claim for unfair dismissal in the High Court since she was bound to follow the decision of the Court of Appeal in Ray George which considered and applied Burrill and which is sound in law.

[25] Accordingly, the appeal is dismissed with costs to the Corporation. In the court below, the learned master ordered that costs will be assessed if not agreed. On this appeal, the Corporation will be entitled to two-thirds of those assessed or agreed costs.

Indra Hariprashad-Charles
Justice of Appeal [Ag.]

I concur.

Hugh A. Rawlins
Chief Justice

I concur.

Ola Mae Edwards
Justice of Appeal [Ag.]

[14] Suratt [supra] at paragraph 39.
[15] (1999) 60 WIR 227