In The Supreme Court of Bermuda

CIVIL JURISDICTION

2025: No. 29

BETWEEN:

CHRIS FURBERT JR

Applicant

-AND-

STEVEDORING SERVICES LIMITED

Respondent

RULING

Date of Hearing: **13 February 2025**
Date of Ruling: **14 February 2025**

Appearances: *Marc Daniels* of Marc Geoffrey Ltd for Applicant

Dante Williams of Marshall Diel & Myers Ltd for Respondent

RULING of MARTIN J

Introduction

1. This is an *ex parte* application by Mr Furbert for an injunction to restrain his former employer from filling the post he had held prior to his dismissal in February 2020. The application for relief is for a temporary injunction pending the determination of his intended appeal against the decision of the Employment and Labour Relations Tribunal

("ELTR") to award him compensation for unfair dismissal instead of re-instating him to his former position.

2. About an hour before the hearing notice was given to the respondent's attorney who appeared on very short notice to observe the application but did not address the Court on the substantive issues raised by the applicant.

Summary and Disposition

3. For the reasons explained below, the Court has decided to refuse the application for an interim *ex parte* injunction.

Background

4. The complete details of the dispute which led to Mr. Furbert's dismissal are not necessary to relate in full. In order to give the context of the dismissal it is necessary to explain that Mr. Furbert had been suspended from work at the Hamilton Docks because of his involvement in a violent incident with another employee, who was also suspended. Mr. Furbert attended the workplace in breach of his suspension and was asked to leave, but he failed to do so.

5. When Mr. Furbert was again directed to leave by Mr. Jones, the then Chief Executive of Stevedoring Services Limited ("SSL"), there was an exchange of words[1]. Mr. Jones alleged that Mr Furbert said "*I'm going to get you"*. Mr. Furbert said he had said *"I get you"* and *"I know what you are trying to do"*. An independent witness to the exchange said the words were *"I see what you are trying to do"* and *"your day will come*".

6. Mr. Jones considered these words to be threatening and insubordinate. Mr. Jones dismissed Mr Furbert summarily for threatening him and for insubordination in failing to leave the premises when directed to do so. Mr. Furbert denied that his words and actions should have been interpreted as threatening or insubordinate[2].

7. Mr. Furbert challenged his dismissal as being unfair and the matter was referred to the ELRT as a labour dispute under section 70 of the Trade Union and Labour Relations (Consolidation) Act 2021 (the "TULR Act").

8. The matter was delayed for reasons that were not explained, but the matter was heard by the Tribunal in September 2024. In its Determination and Order dated 27 November 2024, the ELRT decided that Mr Furbert's dismissal was unfair because SSL had failed to follow its own grievance procedures and did not consider alternatives before

[1] See paragraphs 20-120 of the Tribunal's Determination and Order (the "Tribunal's Order") exhibited to the affidavit of Chris Furbert Jr dated 5 February 2025
[2] Paragraphs 197-201 of the Tribunal's Order.

summarily terminating Mr. Furbert's employment[3]. However, the Tribunal considered that the circumstances of the exchange were such that it was not unreasonable for Mr. Jones to consider the language threatening, and that it was not unreasonable for Mr. Jones to consider Mr. Furbert's failure to leave the premises when asked to be insubordination. In view of the background the Tribunal found that it was not reasonable for SSL to be required to re-instate Mr. Furbert to his former post and awarded compensation under the Employment and Labour Code for unfair dismissal instead[4].

The present application

9. Mr Furbert wishes to appeal the decision of the Tribunal refusing his claim for re-instatement and seeks an injunction to restrain his former employer from filling the post pending the determination of his appeal.

10. This application is made ostensibly under the provisions of section 94 of the Trade Union and Labour Relations Consolidation Act 2021 (the TULR Act). However, in the course of his presentation, Mr. Daniels rightly accepted that this is not the appropriate provision under which to seek injunctive relief because no allegation has been made (nor could be made) that there has been a breach of the TULR Act.

11. Instead, Mr Daniels advanced the application on the basis that in fact the applicant intends to lodge an appeal against the decision of the Tribunal on a point of law. A copy of a draft Notice of Appeal was then handed in which set out the grounds of intended appeal.

12. The Tribunal's decision was made on 27 November 2024, but the quantum of the award was not determined until 17 January 2025, and the Tribunal declared that the time for appealing its decision of 27 November did not start to run until 17 January 2025. Therefore, the time limited for making an appeal from the Tribunal's decision under the Employment Act ostensibly expired on 7 February 2025.

13. However, Mr. Daniels submitted that the Tribunal's decision was not received by him until a few days after the 17 January 2025 so that the time limited for appeal had not yet expired, and so an application for an extension of time within which to appeal was not necessary.

14. The Court therefore treated Mr. Furbert's application as if it had been made as an application for interim relief pending appeal to the Court under section 44O of the Employment Act 2000. The Employment Act (Appeal Rules) 2014 provide that the

[3] Paragraphs 245 and 262 of the Tribunal's Order.
[4] Paragraphs 280-1 of the Tribunal's Order and its subsequent Award at pages 44-52 of exhibit CF1.

Rules of the Supreme Court 1985 apply (*mutatis mutandis*) to appeals from a decision of the Tribunal.

15. Mr. Daniels undertook to lodge the Notice of Appeal immediately following the hearing in order to ensure that the jurisdiction of the Court to entertain the application was correctly engaged. On that basis the Court proceeded to hear the application *de bene esse* (i.e. as if the proper procedure had been followed).

Injunction pending appeal

16. In support of the need for an injunction pending appeal, Mr. Daniels submitted that the post of Holdman had been advertised, and interviews were ongoing, and that if the post was filled, then Mr. Furbert would be unable to obtain the relief he sought from the Court on appeal, namely re-instatement to his old job. He submitted that there is no other employer on the island for whom Mr. Furbert can seek to work in his chosen occupation, and that therefore SSL should not be permitted to foreclose his opportunity for employment by filling the post, and thereby render his appeal nugatory.

17. Mr. Daniels submitted that the Court has jurisdiction to grant an injunction pending appeal and referred to the case of **Ible and Others v Cedarbridge Academy**[5] in support of the proposition that the Court can grant injunctions in the context of a disputed termination of employment. In that case, the injunction was to restrain the termination of existing contracts of employment. In this case the Court is being asked to restrain the employer from hiring someone new to fill the position that Mr. Furbert used to hold, at least pending the determination of his intended appeal.

The legal test for an injunction pending appeal

18. In order to satisfy the Court that it is appropriate to grant an interim injunction pending appeal where the applicant has already lost at first instance, the applicant must show that the appeal has a "*real prospect of success*". This requires an assessment of the merits of the appeal at a high level, without conducting an in-depth analysis or predetermining the appeal[6].

19. In this case, the issue is narrow because the legislature has created a special regime for the determination of labour and employment disputes and has limited the grounds of intervention by the court to points of law only[7]. Therefore, in order to be able to seek an injunction pending appeal, Mr. Furbert must first demonstrate that there is an arguable point of law that has a real prospect of success before the Court can consider whether the balance of justice requires the grant of injunctive relief pending appeal.

[5] [2010] Bda LR 33 per Kawaley J (as he then was).
[6] **Novartis AG v Hospira UK Ltd** [2013] EWCA Civ 583 at paragraph 41 per Floyd LJ
[7] Section 44O of the Employment Act 2000.

The Proposed Grounds of Appeal

20. The draft Grounds of Appeal raise 6 issues that are expressed to be appeals on points of fact and law, but on closer review, Ground 2 is expressly a matter of fact only and Grounds 3 and 4 relate to findings of the Tribunal in relation to facts determined by the Tribunal. It is not alleged that the Tribunal could not have reached their conclusions on these points on the evidence, and they do not go to the appeal on re-instatement. Therefore, these Grounds are not considered further for the purposes of the application for an injunction pending appeal.

21. Grounds 5 and 6 relate to the Tribunal's decision as to calculation of compensation and involve issues of mixed law and fact. However, these grounds are not relevant to the injunction application because they address the alternative to re-instatement, namely the calculation of compensation as a result of the unfair dismissal of Mr. Furbert. These grounds also do not need to be considered further for the purposes of this application.

22. The only ground that (potentially) involves a point of law is Ground 1. This ground of appeal is put on the basis that the Tribunal decided not to grant re-instatement to Mr. Furbert in the absence of any evidence to show that Mr. Furbert could not reasonably be taken back as an employee.

23. The Court has reviewed the affirmation of Mr Furbert and the materials exhibited to it. All the affidavit says is that Mr Furbert wishes to appeal against the Tribunal's decision to grant him compensation for unfair dismissal instead of re-instatement. There is no elaboration as to why this raises an arguable point of law, nor why it was wrong in law for the Tribunal to have decided not to order his re-instatement to his old job.

24. Mr. Daniels submitted that on review of the relevant passages of the Tribunal's decision[8], the Tribunal relied upon the submissions of counsel about the appropriateness of ordering re-instatement rather than relying on any factual evidence to show that re-instatement was not appropriate.

25. That is the issue that falls to be considered on this application: if there was no evidence to support the Tribunal's conclusion, then there is an arguable ground of appeal on a point of law, because the Court has jurisdiction to set aside a decision which is not supported by any evidence[9]. Alternatively, if it is arguable that no Tribunal could reasonably have come to the conclusion on the basis of the evidence, then the Court can be asked to review the Tribunal's decision[10]. These are points of law for the purposes

[8] Paragraphs 232 and 251of the Tribunal's Order.
[9] **British Telecommunications PLC v Sheridan** [1990] IRLR 27 *"...the absence of evidence to support a particular finding of fact has always been regarded as a pure question of law..."* per Lord Donaldson MR cited with approval by the Bermuda Court of Appeal in **Raynor's Service Station v Bradshaw** [2017] Bda LR 72 per Baker P at paragraph 24.
[10] See for example **Gorhams Ltd v Robinson** [2022] SC (Bda) 41 per Mussenden J (as he then was) at paragraph 41.

of section 44O of the Employment Act 2000.

Assessment of the argument in support of the grant of an interim injunction

26. At this stage it is important to stress that the Court is not addressing the merits of the Appeal itself but is examining whether the underlying requirements for an appeal on a point of law are present within the framework of Ground 1 of the Notice of Appeal.

27. Mr. Daniels' submission was that there were no facts to support the Tribunal's decision not to order re-instatement. Mr. Daniels suggested that there was no evidential basis for the Tribunal to conclude that Mr. Furbert could not be "a good fit" with SSL in the future. Mr. Daniels submitted that the people with whom Mr, Furbert had conflicts in the past are no longer employed by SSL[11].

28. The Tribunal came to the conclusion that it was not reasonable to require SSL to take Mr. Furbert back as an employee in his former post. The decision as to whether to grant re-instatement is one which falls entirely within the discretion of the Tribunal. It has been established that summary dismissal is justified only where it would be unreasonable to expect the employer to continue the employment relationship[12]. It follows from this that reinstatement will not be ordered by the Tribunal if it would be unreasonable to expect the employer to take the employee back.

29. The record of the Tribunal includes evidence which shows that the relationship between the employer and Mr. Furbert was very poor[13]. The Tribunal devoted nine pages to the evaluation of that evidence and came to the conclusion that the threatening behaviour of Mr. Furbert was sufficient for the basis for Mr. Jones to have the reasonable belief that Mr. Furbert was guilty of serious misconduct justifying summary dismissal[14]. In addition, the Tribunal considered that Mr. Furbert's own actions contributed to his dismissal[15].

30. There was also evidence that Mr. Furbert had been involved in a violent incident (which led to his suspension) and that he had returned to the workplace in breach of the terms of his suspension.

31. In addition, there are references in the evidence that Mr. Furbert had failed to follow health and safety procedures. The Tribunal assessed the evidence of the witnesses and concluded[16]:

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[11] Paragraph 255 of the Tribunal's Order.
[12] **Elbow Beach Hotel Bermuda v Lyman** (2016) Bda LR 112 at paragraph 14 per Kawaley CJ.
[13] Paragraph 178 of the Tribunal's Order.
[14] Paragraphs 212 and 236 of the Tribunal's Order applying Trust House Forte Leisure v Aquilar [1976] IRLR 251.
[15] Paragraph 267 of the Tribunal's Order.
[16] Paragraph 178 of the Tribunal's Order (underlining added).

"No evidence was provided that indicate that CF followed those procedures. His failure to do so created or at least contributed to the toxic atmosphere within the organisation. The Tribunal opined that his behaviour over the years was a significant contributor to the bad working relations between SSL management and the Union..."

32. Although this evidence was not directly related to the circumstances surrounding Mr. Furbert's termination, it was background evidence which the Tribunal considered was important and significant in assessing the relationship between SSL and Mr. Furbert.

33. Without making any detailed assessment of the strengths and weaknesses of the appeal, it is apparent that there was evidence on which the Tribunal could reach the conclusion that it did. On an appeal on the point of law that is put on the basis that there was no evidence on which the Tribunal could come to the conclusion it did, the Court does not second-guess the assessment of the Tribunal, provided that there was sufficient evidence to support the conclusion overall[17]. In my judgment, there was evidence that was cogent and reliable on which the Tribunal could come to the conclusion it did.

34. The Tribunal was satisfied that the conduct alleged occurred (indeed it was admitted) and although Mr. Furbert argued his actions were neither threatening nor insubordinate, the Tribunal found that it was not unreasonable for Mr. Jones to have perceived them as such.

35. However, it is important to repeat that the Tribunal found that the dismissal was unfair because SSL (i) failed to follow the appropriate grievance process (ii) did not investigate the matter (iii) did not allow Mr. Furbert the opportunity to explain the matter or defend his actions (iv) did not examine whether there were any mitigating circumstances and (v) did not consider alternative sanctions before deciding to dismiss Mr. Furbert summarily[18].

Conclusion

36. The Court therefore considers that there is no real prospect of success on Ground 1 of the proposed Grounds of Appeal because there clearly was *some* evidence which would support the conclusion of the Tribunal that re-instatement was not the appropriate remedy in this case. In addition, it cannot be said that no reasonable Tribunal could properly have reached the conclusion it did (i.e. it was not a perverse decision against the weight of the evidence).

37. Consequently, the application for interim injunctive relief to restrain SSL from hiring another employee as Holdman must therefore be dismissed.

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[17] See **Elbow Beach Hotel Bermuda v Lyman** (supra) at paragraph 4 per Kawaley CJ and **Raynor's Service Station v Bradshaw** (supra) at paragraph 20 per Baker P.
[18] Paragraphs 242, 245 and 262 of the Tribunal's Order.

38. The Court is at pains to stress that Grounds 5 and 6 of the draft Notice of Appeal which relate to the calculation of compensation remain open to Mr. Furbert.

***Ex parte* on notice**

39. This application was made *ex parte* but notice was given of the application to SSL's attorneys on the morning of the hearing, even though the application had been filed with the Court on 5 February 2025—eight days before the hearing. This is highly irregular and requires comment by the Court.

40. The general principle is that even where an application is being made on grounds of urgency and that there is not sufficient time to serve the application on the respondent under the rules, the respondent should be put on notice of the *ex parte* application. This was the position under the normal rules of procedure established by case law precedent, but it was formalised in Bermuda as long ago as 2011 in a Practice Direction[19].

41. The Practice Direction requires the party seeking an injunction on an expedited basis to put the other side on notice of the intended application so that the other side can attend either as an observer or (if they choose to do so) to participate in the hearing.

42. The only exceptions are where the giving of notice is likely to defeat the application either by reason of delay or precipitating the action the application is designed to prevent.

43. There was no evidence that the purpose of the application would have been defeated by notifying SSL's attorneys in advance of the hearing. Furthermore, there was more than adequate time to serve SSL's attorneys with the application and comply with the ordinary rules as to service of an *inter partes* summons.

44. Counsel is reminded that breaches of the requirements of the Practice Direction may result in sanctions being applied in costs or, in appropriate cases, the refusal of the application for relief.

Dated this 14th day of February 2025

THE HON. JUSTICE ANDREW MARTIN

PUSINE JUDGE

[19] Circular No 6 of 2011