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IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 463 OF 2008

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| **BETWEEN:** | **THE FINAL TOUCH LTD.** | **APPELLANT** |
| **AND:** | **THE LABOUR APPEALS TRIBUNAL** | **FIRST RESPONDENT** |
| **AND:** | **NORMAN WILKINS** | **SECOND RESPONDENT** |

**Appearances:** **Ms. Rosie Whittaker-Myles of Charles Adams Ritchie & Duckworth for the Appellant**
**Mr. Huw Moses of Appleby for the Labour Appeals Tribunal – the First Respondent**
**Mr. James Kennedy of Samson & McGrath for the Second Respondent**

**Before:** **Hon. Justice Henderson**

**Heard:** **January 5, 2009**

GRAND COURT CAYMAN ISLANDS

**JUDGMENT**

After his employment by the appellant, The Final Touch Ltd., was terminated abruptly, the second respondent Norman Wilkins complained to the Director of Labour. His complaint was dismissed by a Labour Tribunal but that decision was itself overturned by the Labour Appeals Tribunal ("LAT"). This appeal to the Grand Court from the decision of the Labour Appeals Tribunal is confined to a consideration of points of law only.

Mr. Wilkins had been employed by the Final Touch as the Installation Supervisor for about five and a half years when his employment was terminated on January 15, 2008. On that morning, Mr. Wilkins and another employee engaged in a heated verbal exchange which culminated in the other employee receiving cuts to her face and to the

inside of her upper lip. Mr. Wilkins struck her in the face during the argument. The essential question is whether he did so deliberately or accidentally while attempting to defend himself. He says that he was attempting only to move the employee's hand away from his face when either one of his fingers or his watch made contact with her face and caused the injuries. His version of events was corroborated by another employee who witnessed them.

The management of the Final Touch accepted the description of the altercation given to them by the employee, who said that Mr. Wilkins punched her in the face deliberately. Acting on their understanding of what happened, the Final Touch terminated the employment of Mr. Wilkins immediately.

The Labour Tribunal hearing was conducted on May 30th, 2008. The conclusion of the three-member tribunal was somewhat equivocal. The panel said (at page three) that it had not been "convinced by the employer's version of events, nor by the testimony of the employer's witnesses." However, the panel was satisfied that "Mr. Wilkins did in fact hit Mrs. Lutz in some way" and, in the Tribunal's view, that provided sufficient grounds for an immediate termination for good cause and without severance pay.

The decision of the LAT on September 2nd, 2008 set aside the decision on the ground that the dismissal of Mr. Wilkins was "unfair" because the employer had not acted reasonably in the circumstances. The LAT found that the Final Touch had failed to "undertake any form of reasonable investigation" before deciding upon a dismissal. By its own admission, the decision to dismiss Mr. Wilkins had been made by the Final

Touch from the outset; the LAT found that he was denied the right to put forward his version of events to his employer with a view to changing its mind.

In dismissing Mr. Wilkins, the Final Touch was taking action under the *Labour Law* (2007 Revision) sections 51 and 52, which read in part:

> 51. (1) Subject to subsections (2) and (3), a dismissal shall not be unfair if the reason assigned by the employer for it is –
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> (a) misconduct of the employee within section 52(1);
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> ...
>
> and under the circumstances the employer acted reasonably.
>
> ...
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> (3) The question whether an employer has acted reasonably for the purposes of this Part shall be determined in accordance with equity and the substantial merits of the case having regard to all the circumstances.
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> 52. (1) An employer may terminate forthwith the employment of an employee where the employee has been guilty of misconduct in or in relation to his employment so serious that the employer cannot reasonably be expected to take any course other than termination. Such misconduct includes, but is not limited to situations in which the employee has –
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> (a) conducted himself in such a manner as clearly to demonstrate that the employment relationship cannot reasonably be expected to continue;
> (b) committed a criminal offence in the course of employment without the consent, express or implied, of the employer;
>
> ...

Essentially, the finding of the LAT was that the Final Touch had not acted reasonably within the meaning of section 51(1) because it had not made a considered decision as to which version of events to accept. If the version advanced by Mr. Wilkins and his supporting witness was correct, the blow to the face of his fellow employee was an unfortunate accident. On that view of the matter, it would not be misconduct falling within section 52(1) of the *Labour Law* and would not provide a justification for immediate dismissal. In deciding to prefer the version of events advanced by the

victim, the Final Touch failed to give adequate consideration to the other side of the story and therefore acted unreasonably.

The Appeal to this court from the LAT is confined to pure questions of law. Section 79 of the *Labour Law* says:

> (1) An appeal may be made to the Grand Court from a decision of the Appeals Tribunal upon a point of law only.
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> (2) Subject to subsection (1), no decision of a Labour Tribunal or the Appeals Tribunal shall be open to challenge or review in any court of law upon any grounds whatsoever.

Questions of fact and questions of mixed law and fact are excluded from consideration. On an appeal of this sort, the jurisdiction of the Grand Court is a narrow one.

The first ground of appeal is that the LAT "erred in law and in fact" by concluding that the Final Touch did not act reasonably because it failed to "undertake any form of reasonable investigation before deciding to dismiss Mr. Wilkins." This ground goes on to assert that the LAT should have, but did not, give consideration to a certain telephone discussion and a face to face meeting with Mr. Wilkins at which, it is alleged, he was provided with an adequate opportunity to explain himself.

The opening words of this ground ("erred in law and in fact") are a reasonable characterization of the issue and, as a consequence, are fatal. The reasonableness of an employer's actions in the circumstances of a dismissal and, in particular, the reasonableness of any investigation into the circumstances said to be justification for the dismissal are pre-eminently questions of fact. At the most, such a ground of appeal may raise questions of mixed law and fact. Here, the appellant urges me to find that

the LAT should have placed more weight upon the discussions which the Final Touch did have with Mr. Wilkins on the date of his termination and to find that, contrary to the decision of the LAT, these constituted a sufficient investigation of the circumstances to demonstrate that the employer acted reasonably. No question of law is involved. Quite simply, I am without jurisdiction to substitute my own view of the matter for that of the LAT.

Ground Number two seems to me to raise exactly the same question in a different form. The appellant says that the LAT "erred in law in not having regard or not having sufficient regard to the provision of section 51(3) of the *Labour Law*". That section directs a finder of fact to determine the question of reasonableness in accordance with equity and the substantial merits of the case having regard to all the circumstances. There is no indication in the record that the LAT failed to do that. In its briefly stated decision, it put particular emphasis upon its finding that the decision to dismiss Mr. Wilkins was made at the outset, before the Final Touch had heard his side of the case and before, I infer, the telephone conversation and the face to face meeting referred to above. This was a view of the facts the LAT was entitled to take. Whether, on the same evidence, I would take the same view is immaterial. The question is pre-eminently one of fact, not law. The fact that this concern underpins the decision of the LAT does not demonstrate or even suggest that it disregarded the obligation imposed by section 51(3) of the *Labour Law*.

The third and final ground is that the LAT erred in proceeding to hear the appeal without the benefit of a complete transcript of the original hearing.

Mr. Moses for the LAT explained that a partial transcript was available but the evidence of the victim and some other bits of evidence were missing. He said the LAT felt it better to utilize what was available than to disregard the partial transcript. When only a partial record of the proceedings under appeal is available to an appellate tribunal, it must exercise special caution in the way it assesses the evidence. Tribunal members should remind themselves that the evidence which has been reduced to writing and is before them is likely to make a greater impact upon their thinking unless a special effort is made to take into account the missing evidence. There is no rule, however, which prevents the entertaining of an appeal in cases where only a portion of the evidence is available in written form.

Ground four was abandoned.

For these reasons, the appeal from the decision of the LAT is dismissed.

There was some discussion at the hearing concerning the nature and scope of the proper role of the LAT on an appeal from one of its rulings. When an appeal is initiated, the appellant must serve his notice of motion and material in support upon the chairman of the LAT as well as upon every other party who is "directly affected" by the matters in issue: *Grand Court Rules*, order 55, rule 4(1). The LAT, however, is not a party to the appeal in the fullest sense. As an adjudicative body whose decision is being questioned, the LAT should assume a neutral stance and not seek to advance arguments in support of its own decision. In some cases, the LAT's presence at the hearing may be of considerable assistance. It may be called upon to explain aspects of its practice and procedure which are unfamiliar to the court or to comment upon

relevant questions of policy in the field of labour and employment. It would be wrong in principle and might serve to taint the future independence of the tribunal for it to advance affirmative arguments in favour of its ruling or, in particular, to supplement the reasons it has already given.

The limited role played by the LAT in an appeal from one of its own decisions will not ordinarily entitle it to or make it liable to an award of costs. The LAT is never required to appear. It is best left to its own understanding of the matters in issue to determine whether its presence at the hearing would be useful. From time to time, this court may request the LAT to render its assistance during a hearing. As between the active parties to the proceeding (excluding the tribunal itself), costs will ordinarily follow the event. I award to Mr. Wilkins his costs of this appeal.

Mr. Moses for the tribunal was present during the hearing and rendered considerable assistance, which is appreciated. His submissions were confined within the parameters I set out above. I make no order for costs for or against the LAT.

Dated this 26th day of February, 2009

Henderson, J.

Henderson, J.
Judge of the Grand Court

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