In The Supreme Court of Bermuda

CIVIL JURISDICTION
2022: No. 24

IN THE MATTER OF AN APPEAL AGAINST A DETERMINATION AND ORDER OF THE EMPLOYMENT & LABOUR RELATIONS TRIBUNAL

AND IN THE MATTER OF THE EMPLOYMENT ACT 2000 AND THE EMPLOYMENT ACT (APPEAL) RULES 2014

BETWEEN:

BERMUDA HEALTHCARE SERVICES LTD.
AND BROWN DARRELL CLINIC

Appellants

-and-

TUVIERE IDEH

Respondent

Before: **Assistant Justice Elkinson**

Representation: **Ms. Juliana Snelling, Canterbury Law Limited for the Applicant**
The Respondent in Person

Date of Hearing: **22 February 2023**

Date of Judgment: **31 March 2023**

JUDGMENT

ELKINSON AJ

1. There was a Determination and Order made on 21st July 2022 ("the Determination" or "the Award") by the Employment and Labour Relations Tribunal ("the Tribunal") following hearings which took place on 24th March and 1st June 2022. There was a dispute between the parties to the Appeal. Mr. Ideh had been an employee of the Appellants and contended that he had been subject to unfair dismissal under Section 28 of the Employment Act 2000 ("the Act"). The Appellants' position was that the relationship was terminated for cause and the maximum liability they had to their former employee was one month's notice with no entitlement to severance pay. The Tribunal held Mr. Ideh was unfairly terminated and ordered that he be paid one month's salary in lieu of notice and 16 week's wages as compensation. There was an additional amount to be paid equivalent to 4½ days' vacation and '*hold-back pay*' of $2,813. This is an appeal from that Award under Section 44O(1) of the Act and is an appeal on a point of law only.

THE EMPLOYMENT AND LABOUR RELATIONS TRIBUNAL

2. The enactment of the Trade Union and Labour Relations (Consolidation) Act 2021 ("the 2021 Act"), which became operative on 1st June 2021, provided at Section 44 for the establishment of the Employment and Labour Relations Tribunal. This Tribunal has jurisdiction to hear and determine complaints, labour disputes, differences, conflicts and other matters referred to it under the Employment and Labour Code. Before this date, there had been 9 distinct tribunals and boards under the different labour legislation. Under the 2021 Act all disputes are now referred to the Employment and Labour Relations Tribunal. I refer to this because the main relief sought by Appellants is that the matter be sent back to the Tribunal to be heard again. Appellants' primary submission in support of that relief is that no notes of the oral evidence given by the parties have been produced by the Tribunal and that the Award was delivered long

after the statutory period, leaving open to conjecture the answer to the question how did the Tribunal reach the conclusions which they did. Appellants submit that not having any notes of the evidence is a serious failure on the part of the Tribunal, individually and collectively. The failure is egregious and warrants a rehearing of the parties' dispute. Given the present role of the Tribunal and the important matters which come before it, a party could legitimately expect that notes of the evidence would be taken by one if not all of the members, or at least caused by them to be taken, in order that there is, as recited in section 44C(1)(b) of the Act, an *"...expeditious and just hearing and determination of a matter before the Tribunal."*

BACKGROUND TO THE EMPLOYMENT RELATIONSHIP

3. As recited in the Tribunal's Award, Mr. Ideh is an American who had come to Bermuda to take up the position as a Senior Manager for the medical facility owned and operated by Dr. Brown and his wife, Mrs. Wanda Hendon-Brown. He was required to serve a probationary period of 90 days and after that period he was confirmed as the Chief Operating Officer of the facility. However, after a short period in that post, he was terminated.

4. The Tribunal found that he was unfairly dismissed and the Tribunal determined that having regard to the seniority of the post and the customary procedure in such terminations that a typical notice period could be at least 3 or 6 months. Oral evidence had been given at the hearing. There were no written statements from the witnesses.

5. The Tribunal went on to make the Award as detailed above which they said they considered to be just and equitable. The Tribunal found that Mr. Ideh had not contributed in any substantial way to the circumstances of his abrupt dismissal. They calculated that he had been in his full post as Chief Operating Officer for 11 days after his probation period. Counsel for the Appellants contended that this was not correct and that in fact he had only been in his full post for 2 days.

6. The grounds of appeal put forward by the Appellants, in addition to the failure of the Tribunal to have noted the evidence, are that there were serious errors made by the Tribunal in respect of –

(a) substituting their view of the seniority of the post and the customary procedure for determining the length of notice where there existed an agreed notice period of one month.

(b) awarding 16 weeks wages as just and equitable compensation under Section 40 (4) of the Act in circumstances where Mr. Ideh had been employed for less than a year.

(c) contributing to his own dismissal.

(d) failing in its duty under Section 44F(1) of the Act to deliver its Decision within 30 days of the hearing and that as a consequence of the breach of Section 44F(1), the Tribunal was *functus officio* and had no jurisdiction to render a decision.

RELIEF SOUGHT

7. The primary relief sought by Ms. Snelling, counsel on behalf of the Appellants, is that this court quash the Award and remit the matter back to the Tribunal to make an Award in accordance with the law. A secondary ground of relief is that this court quash the whole Determination and Order and "*dismiss the complaint with costs.*"

THE DIRECTIONS FOR THE HEARING OF THE APPEAL

8. Directions are usually given by this court in respect of appeals from the Employment Tribunal and one which was made in this appeal was that the Tribunal produce the record of the proceedings which took place before it. Further to that Direction, the Tribunal did produce various documents but did not produce any notes of evidence. It would appear through an exchange of correspondence between counsel for the Appellants and the secretary of the Tribunal that there were no notes of evidence in relation to the two hearings which took place before the three members of the Tribunal, Dr. Michael Bradshaw as Chairman, Ms. Jocene C. Harmon, Deputy Chairman and Mr. John Payne, Tribunal Member.

9. It was primarily on this basis that counsel for the Appellants submitted that it was appropriate that the matter be sent back to the Employment Tribunal, to be composed of different members. Counsel referred this court to the decision of **Island Construction Services Company v Brangman [2013] SC (Bda) 7 Civ.** where Mr. Justice Hellman, referencing the procedure before the Employment Tribunal, quoted Lord Clyde in **R(Alconbury Ltd.) v Environment Secretary [2003] 2 AC 295** at paragraph 170:-

> *"What is required is that there should be a Decision with reasons. Provided that these set out clearly the grounds on which the Decision has been reached. It does not seem to me necessary that all the thinking which lies behind it should also be made available."*

Hellman J went on to say: -

> *"It is nonetheless important that the Chairman of the Tribunal take a full note of the evidence. This, together with the Tribunal's written decision and any documentary evidence before the Tribunal will form the record of proceedings before the Tribunal for the purposes of the appeal. Without them, the court may have difficulty ascertaining whether there is material evidence which the Tribunal did not take into account. The court should not have to rely on a presumption for this purpose."*

10. Any appeal to this court from the Tribunal is only on the basis of an error of law. However, as was stated in **Matthews v Bank of Bermuda Limited [2010] Bda LR 56**, a failure to give adequate reasons and analysis is also an error of law. It was submitted by counsel for the Appellants that the context of that case was that appeals had arisen from the Tribunals at that time as a result of their relative inexperience and that this is the situation at present where this Tribunal did not take notes of the evidence. She urged on this court that, as in the **Matthews** case, the Award of the Tribunal should be quashed and remitted back to a new Tribunal.

11. Counsel for the Appellant also cited the case of **IRC Sandys Ltd. v Eugenia Thomas [2011] Bda LR 10** as further support for her argument that the failure to provide any notes of the evidence given at the Employment Tribunal is an error in law. Mr. Justice Kawaley, as he then

was, held that where insufficient evidence exists to support a factual finding, the fact of insufficiency will itself constitute an error of law.

THE DELAY IN DELIVERING THE AWARD WITHIN THIRTY (30) DAYS OF THE HEARING

12. Counsel for Appellants also argued that in any event the Award was a nullity as it had been delivered to the parties after the statutory period for doing so. The Employment Act 2000 provides at Section 44F as follows:-

> **Notification of Publication of Award**
> 44F(1) –
>
> *"With respect to the hearing of any matter before the Tribunal, the parties to such hearing shall be notified by the chairman of the award made by the Tribunal within 30 days of the conclusion of the hearing..."*

13. The Tribunal has 30 days to provide its award to the parties. There is a failsafe in that section 44F(1)(a) sets out that if the chairman fails to notify the parties, the deputy chairman shall within 10 days after that 30-day period notify the parties. There is even a further failsafe whereby if the deputy chairman has not done this, the remaining member of the Tribunal has 5 days after that period to notify the parties.

14. Section 44F(2) requires the Minister to cause the award to be made public 90 days after the conclusion of the hearing after notification from the Tribunal, save that parties to the proceedings may apply to the Tribunal in respect of any fact which that party *"reasonably wishes to conceal"* and the Tribunal can then give directions. The Award was not made public.

15. Appellants took the position that there had been a complete failure to render the Award within the time provided for by Section 44F. The submission made was that the Tribunal's authority and power to give an award could not be extended beyond the statutory period and the Tribunal

had no inherent powers to extend the time. Effectively, the submission was that the Award became a nullity as a consequence of the failure of the Tribunal to comply with the time limit.

16. The court referred the parties to the case of **One Communications Limited (formerly Keytech Limited) and Logic Communications Limited (trading as One Communications) and Bermuda Digital Communications Limited (trading as One Communications) and Another v. Regulatory Authority [2017] SC (Bda) 97 Civil**, a Judgment delivered by Chief Justice Kawaley on 14th November 2017. There the issue was the failure of the Regulatory Authority to comply with Section 23(6)(a) of the Electronic Communications Act 2011. This provided that the Regulatory Authority had to comply with the obligation to complete the requisite market review within a 4 year period and they had not done so. The court had to consider what were the consequences of the failure to comply with the statutory time limit. The court relied upon the case of **R v Soneji [2006] 1 AC 240** which set out the guiding principles as to what the consequences of a failure to comply with the statutory time limit were. As the Chief Justice stated, the core principle was that the court has to determine what Parliament intended to be the consequence of failing to comply with a time limit.

18. Lord Steyn at page 350 of the Judgment in **Soneji** identified the crucial question as being -

> *"15 ... taking into account those consequences, whether Parliament intended the outcome to be total invalidity. In framing the question in this way it is necessary to have regard to the fact that Parliament ex hypothesi did not consider the point of the ultimate outcome. Inevitably one must be considering objectively what intention should be imputed to Parliament."*

19. The Chief Justice then went on to cite a Bermuda authority, **Roberts v DPP [2008] BDA LR 37** and further passages from the House of Lords in **Soneji**. Those cases determined that the Crown's failure to comply with a time limit did not deprive the Crown of the ability to pursue and obtain a Confiscation Order in the context of a Proceeds of Crime matter. The relevant test was formulated in a nutshell as follows: what consequences would Parliament have intended to flow from the non-compliance complained of? The test is detailed further in paragraphs 42 to 44 of the Chief Justice's Judgment.

20. In applying the **Soneji** test to the issue raised by the Appellants, it would be extraordinary that having written the Award and provided it to the parties, that either the employer or employee could simply say that because it was delivered late that it was a nullity. In analysing this case as to the presumed intention of Parliament and the consequences of non-compliance with the time limits, the competing arguments would appear to be –

(a) what is the point of going back to the Tribunal or any other Tribunal as they would simply reach the same decision?

(b) clearly Parliament intended that time limits be adhered to because the provision as to what would happen if the chairman failed to comply with the time limit provided for the deputy chairman to publish and then if he/she did not comply with the time limit, the other member could publish and thereafter in any event the Minister could publish.

21. There are effectively four (4) opportunities to publish and what has occurred in this case is that all of them were missed. If the award is delivered after the expiry of the last available time period, there is no sanction provided in the statute for such lateness.

22. In the case of **Cheyra Bell v The Attorney General & Others [2023] CA (Bda) 3 Civ** the issue was whether a disciplinary process in the civil service was a nullity when a report, which was required to be sent in writing to the Head of Public Service with a recommendation as to penalty, wasn't sent. The question then was whether the technical breach of the regulations as set out in the second schedule to the Public Service Commission Regulations were mandatory or imperative provisions or merely "*directory.*" Justice of Appeal Kay cited the case of **Howard & Bollington (1877) 2 PD 203** where Lord Penzance, in referring to the imperative/directory distinctions, said:–

> *"... there are some provisions in respect of which the court would take an opposite view, and would feel that they are matters which must be strictly obeyed, otherwise the whole proceedings that subsequently follow must come to an end. Now the question is, to which category does the provision in question in this case belongs? I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-*

matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory."

23. It is difficult to discern why the Award of the Employment Tribunal should be considered a nullity due to its late delivery and I am inclined to the view that the statutory time period is one which is directory and not imperative.

24. Given the importance of this issue and the fact that it was not argued before the court, I will not make any finding in relation to it save to say that I would hope that any Tribunal which sits in the future will be aware that a failure to comply with the statutory time period is a breach of the statutory duty imposed on the persons referred to in Section 44F.

25. I am satisfied to not make a finding on this issue because the court is in any event granting the relief sought by the Appellants based on the failure of the Tribunal to provide notes of the evidence. I order that this matter be referred back to an Employment and Labour Tribunal to be comprised of different individuals than those who originally participated. It is to be hoped that the delivery of any award by the Tribunal would be within the statutory time limit and that those who sit on the Tribunal take notes of the proceedings which can be referred to in due course if any party to the hearing subsequently appeals. It is to be noted that this is no longer a Tribunal which only deals with employer/employee disputes but has the jurisdiction which was formally reserved, for example, to the Permanent Arbitration Tribunal and that the nature of disputes which arise under the Trade Union and Labour Relations (Consolidation) Act 2021 may well require an expedited delivery of an award.

26. In the light of what is set out above, I do not think it appropriate for the court to go any further in respect of the other arguments which were raised in the appeal.

27. In the circumstance as set out in this Judgment, the court accedes to the Appellants' request that the matter be remitted to be heard by an Employment and Labour Relations Tribunal to be composed of members other than those who sat previously in this matter. I would hope that those members will be cognizant of the important duty imposed on them in endeavouring to

reach a fair decision on the dispute which is brought before them and that each of them would take notes which would be of assistance in reaching a collective decision on the dispute and, in the event that there is an appeal to this court, that the notes would be available for the parties.

28. In relation to the costs of the appeal, even though Appellants have succeeded, I make no order as to costs as, simply put, it is not Respondent's fault, and to be clear neither is it Appellants' fault, that the matter must now be remitted. I am also guided by the words of Mr. Justice Kawaley in the **IRC Sandys** case where he stated, in reference to an adverse costs order against an employee: -

> *"In this type of case, it would defeat the objects of the statute if an employee brings a claim, wins at first instance and loses an appeal on a point of law in circumstances where she (he) has not had counsel or led the Tribunal into an error of law, and has to pay costs."*

29. Mr. Ideh was unrepresented below and certainly he is not the one who has caused the matter to be reheard. A costs order against him could potentially discourage other employees from using the statutory framework because the possible burden of costs would be punitive.

30. However, I have not heard the parties on the issue of costs and if either party wishes a different costs order to be made they should notify the Registrar within 28 days of the date of this Judgment.

DATED this 31st day of March 2023

JEFFREY ELKINSON
(ASSISTANT JUSTICE)