In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2012: NO. 87

ANDREAS BATTISTON

Appellant

-v-

PERNELL GRANT

Respondent

JUDGMENT

(in Court)[1]

"Appeal from board of inquiry under Human Rights Act 1981-discrimination on the grounds of place of origin- appellate function of court-whether rules of natural justice complied with "

Date of hearing: April 20, 2016
Date of Judgment: May 3l, 2016

Mr. Jai Pachai, Wakefield Quin Limited, for the 2nd Appellant
Mr. Allan Doughty, Beesmont Law Limited. for the Respondent

Background

1. Between October 10 and 12, 2011, a Board of Inquiry (Paul Harshaw, Chair, Angela Berry and Thaddeus Hollis III) ("the Board") heard a complaint initiated by the Respondent to the present appeal with the Human Rights Commission in or about June 2008. Judgment was delivered on February 9, 2012 ("the Decision"). The initial

[1] The present Judgment was circulated to the parties without a hearing.

Appellants[2] to the present appeal were all found liable for discrimination in relation to the Respondent's employment on the grounds of race. The Respondent herein requested a separate hearing on compensation, to the Board's disappointment.

2. On or about March 7, 2012, the Appellants herein filed an Originating Notice of Motion which was amended on or about March 15, 2012 (the "Notice of Appeal"). The covering letter under which the Notice of Appeal was filed expressed the hope that the Registrar would fix a hearing to settle the record, but no further attempt was seemingly made to prosecute the appeal.

3. The Respondent clearly had notice of the appeal because although no appearance was required, he entered an appearance through his attorneys on April 3, 2012. The next step in the appeal was the Respondent's issuing a Summons dated October 9, 2014 (supported by the First Affidavits of Pernell Grant and Matthew Madeiros, respectively) to strike-out the appeal on abuse of process grounds. The Appellants responded by issuing a Summons dated October 23, 2014 seeking to settle the record and related directions for the hearing of the appeal. The following directions were ordered:

    (a) on October 30, 2014, after the Respondent challenged the authority of the Appellants to instruct their attorneys, their Summons for Directions was adjourned generally with liberty to restore by letter to the Registrar;

    (b) on November 20, 2014, directions were given for the hearing of the Respondent's strike-out Summons;

    (c) on January 7, 2015, I struck-out the appeal of the 1st Appellant, Apex Construction Management Limited ("the Company") which, it was conceded, had been struck-off the register and dissolved. I dismissed the balance of the Respondent's strike-out Summons. Directions were given for the hearing of the 2nd and 3rd Appellant's appeal "*on the preliminary issue of whether they are liable to the Respondent pursuant to the Human Rights Act, 1981*".

4. Following the hearing of the preliminary issue on March 13, 2015, on April 6, 2015 I delivered a Ruling[3] which concluded in material part as follows:

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[2] The appeal of the original 1st Appellant, Apex Construction Management Limited, which had been struck off the Register of Companies and dissolved, was dismissed. The appeal of the original 3rd Appellant, Kevin Mason, was allowed on the basis of a concession made at the trial of a preliminary issue on March 13, 2015.

[3] *Apex Construction Management Ltd et al-v-Grant* [2015] Bda LR [ ]; [2015] SC (Bda) 24 App (6 April 2015).

"*26… without deciding at this stage what the impact of this misdirection is on the disposition of the present appeal, I am bound to find that the Board erred in law by:*

> *(a) initially finding that each respondent "had absolutely no intention of training or promoting Bermudians generally, or Black Bermudians in particular" (paragraph 20); and*
>
> *(b)then proceeding to distinguish between the roles of the corporate and natural respondents by finding that the 'First Respondent, with the knowledge if not the actual participation of the Second and Third Respondents, did engage in a form of discrimination against the Complainant of a type mentioned in section 6(1), paragraphs (c) and (f)…', in circumstances where there was no or no sufficient legal and/or evidential foundation for finding that mere knowledge on the 2nd Appellant's part of discriminatory acts engaged in by other unidentified agents or employees of the corporate employer was enough to render him liable.*

31… I am unable to finally resolve the preliminary issue of "whether they are liable to the Respondent pursuant to the Human Rights Act, 1981", either in the 2nd Appellant's favour or against him at this stage, although said issue was resolved by concession in favour of the 3rd Appellant. The appeal may now be listed for hearing of the remaining grounds of appeal and, in any event, on the question of whether the misdirection in law which the Board made was either:

> *(a) so substantive as to undermine the validity of the decision altogether; or*
>
> *(b) so technical that it affords an insufficient basis for setting aside the decision at all.*"

5. At the hearing of the appeal, the main complaints advanced by the Appellant were that:

   (1) an appellate court should not make primary findings of wrongdoing on the Appellant's part (.i.e. that he had actively participated in any discriminatory acts);

   (2) the rules of natural justice had been infringed because he had not been given notice of the specific grounds on which he was ultimately found to have been liable; and

   (3) the Board applied the wrong legal test on discrimination.

6. The first two grounds appeared to me to have more conviction to them and oral argument focussed on the second main ground of appeal. The third ground can be dealt with more shortly. To assess the merits of the two main planks of the appeal, it is necessary to consider two aspects of the case presented before the Board. Firstly, it is crucial to determine whether the unambiguous finding that the Company committed the relevant discriminatory acts was implicitly based on a finding that the Appellant participated in the relevant acts. In other words, was there (or ought there to have been) by necessary implication a primary finding that the Appellant was guilty of more than having "knowledge" of the unlawful conduct? Secondly, was the Appellant deprived of a fair hearing because he had no sufficient opportunity to meet the allegations which were found to have been proved against him?

The Board's decision

7. It was common ground that the Respondent's initial and primary complaint was that he had been discriminated against on the grounds of his place of origin. Paragraph 5 of the Board's judgment states, so far as is material, as follows:

> "*5. The crux of the Complaint, as drafted, is that the Complainant was : (1) offered employment on terms less favourable than the terms offered to others, and those others consisted of groups of Polish and Canadian contract workers; (2) subject to special conditions of employment, in that he claims he was denied the opportunity to work overtime; and (3) (by his Amended Complaint) suffered reprisals in the nature of 'staged' (or false) complaints in order to justify termination of his employment with the First Respondent…*"

8. The Appellant "*was the Operations Manager (the 'boss' for present purposes) of the First* [Appellant]" (paragraph 4). The following substantive findings of discrimination were thereafter recorded:

> (1) "*20….The evidence is clear and we find as a fact, that the Respondents had absolutely no intention of training or promoting Bermudians generally, or black Bermudians in particular. We are under no doubt at all that the Respondents wanted 'black faces in the hole', that is, black workers on the construction site in order to support their claims for work permits for contract workers, such as the Polish and Canadian workers mentioned above. The evidence of all witnesses for the Complainant, no matter how unsatisfactory those witnesses might have been, was clear on this point. Indeed, no credible evidence of any form of training for Bermudian labourers was led by the respondents*";

(2) "*30. Our finding is that the first Respondent, with the knowledge if not [the] actual participation of the Second and Third respondents, did engage in a form of discrimination against the Complainant of a type mentioned in section 6(1), paragraphs (c) and (f), viz. refusing to train or promote an employee and maintaining separate lines of progression for advancement in employment based upon criteria specified in section 2((2)(a)* [i.e. direct discrimination on any of the prohibited grounds], *where the maintenance will adversely affect any employee.*

31. *If we are wrong in our finding in paragraph 30, above, we would go on, as Mr. Doughty invited us to do, to consider whether the Complainant was a victim of indirect discrimination and we would come to the same conclusion for essentially the same reasons.*

(3) "*35….We have taken a view of this case which does not correspond with the primary case presented by either party, but we have come to a conclusion that we agree on and that we are convinced on the evidence reflects the true state of affairs.*"

The Factual Findings made by the Board

9. Identifying the findings made by any trier of fact requires an interpretation of the articulated decision against the background of the evidence led before the tribunal. The express findings recorded were as follows:

   (a) <u>Primary finding</u>: "*The evidence is clear and we find as a fact, that the Respondent had absolutely no intention of training or promoting Bermudians generally, or black Bermudians in particular*" [emphasis added];

   (b) <u>Conclusory finding</u>: "*Our finding is that the first Respondent, with the knowledge if not [the] actual participation of the Second and Third respondents, did engage in a form of discrimination against the Complainant of a type mentioned in section 6(1), paragraphs (c) and (f), viz. refusing to train or promote an employee and maintaining separate lines of progression for advancement in employment based upon criteria specified in section 2((2)(a)* [i.e. direct discrimination on any of the prohibited grounds], *where the maintenance will adversely affect any employee.*"

10. In my judgment it is appropriate to characterise finding (a) as a primary finding and finding (b) as conclusory, even though the former does not contain any explicit reference to <u>action</u> coupled with the relevant intention. The findings as to the relevant

intentions were quite obviously based on evidence about the parties' <u>actions</u>. It is difficult to sensibly construe finding (a) as meaning that the Board found that all three respondents had discriminatory intentions wholly detached from any corresponding discriminatory actions. Accordingly, the real question is whether the Board's erroneous conclusory finding, apparently distinguishing between the active involvement of the Company itself and its human actors (including, primarily, the Appellant), may fairly be read as incorporating a primary finding that the participation of the Company and the Appellant were materially different. I am bound to find that there is no proper basis for reading conclusory finding (b) as incorporating a primary finding that the Appellant did not sufficiently participate in the discriminatory actions all three respondents were found liable for.

11. Mr Pachai complained that the Board wrongly 'lumped' all three respondents together. For instance, in paragraph 2 of the Decision:

> "*…We should emphasise at the outset that Mr Pachai was representing all three Respondents, though the Third Respondent…did not attend the inquiry at any stage and he did not give any evidence. His case must necessarily stand or fall with that of the First respondent company and the Second Respondent, who did give evidence and was cross-examined on that evidence.*"

12. This was a surprising complaint in light of the fact that Mr Pachai was bound to concede that he did not expressly distinguish between the respective legal positions of, *inter alia*, the Company and the Appellant, before the Board. Moreover, the Appellant was the only current employee of the Company and representative of its management who gave evidence. He described himself under cross-examination as "*Construction Operations Manager*". Indeed Mr Doughty specifically established (Transcript, page 460) the following:

> "*Q. And just to put a—to put a finer point on this, this meant that you had direct oversight of all aspects of the operations?*
>
> *A. Correct.*"

13. As Operations Manager the Appellant admitted he was directly involved in hiring and managing employees. Indeed, he exhibited to his Witness Statement a contract of employment which he signed on behalf of the Company. Although the Appellant asserted that the Company's owner "*knew what was going on*" (Transcript, page 460), all the evidence before the Board pointed to the Appellant being the main human agent through which the impugned employment practices were directed and carried out. This is presumably why the Appellant was named as an individual respondent and was the sole manager called to give evidence in his own as well as in the Company's defence. His central role in relation to hiring was clearly appreciated by the Board, because Mrs Berry asked the Appellant careful questions about his role in the hiring process and the role played by sub-contractors in relation foreign workers (Transcript, pages 619-622).

14. There was, based on the way the Company and the Appellant conducted their case, no or no obvious evidential basis for the Board distinguishing between the position of the Company and the Appellant at all. The Appellant was the Company as far as construction and employment operations were concerned. The position of the 3rd respondent was different. He was complained against as "Site Manager"; it is wholly unclear on what basis he could be said to have acted in a discriminatory manner in any systemic sense, although the Respondent's Witness Statement asserted that he was on occasions responsible for allocating overtime. He sensibly did not waste time or costs participating in the hearing. The Board ought to have distinguished his position from that of the Company and the Appellant, and Mr Doughty sensibly conceded as much at the preliminary issues hearing stage.

Should the appeal be allowed on the grounds of an error of law as to whether or not an essential element of discrimination had been made out against the Appellant?

15. Based on the evidence which was before the Board and the primary finding that the "*evidence is clear and we find as a fact, that the Respondents had absolutely no intention of training or promoting Bermudians generally, or black Bermudians in particular*", I find that:

(a) the conclusory finding that "*the first Respondent, with the knowledge if not [the] actual participation of the Second and Third respondents, did engage in a form of discrimination against the Complainant*" can best be seen as imperfect expression. It seems most likely that the Board meant to say "the first and second Respondents, with the knowledge if not the actual participation of the^^^ Third respondent^…"; alternatively

(b) this was the conclusory finding which the Board ought to have made based on the primary facts which they found to have been proved. As Lord Scott opined in *Mon Tresor and Mon Desert Limited-v- Ministry of Housing and Lands* [2008] UKPC 31:

> "*2… An appellate tribunal ought to be slow to reject a finding of specific fact by a lower court or tribunal, especially one founded on the credibility or bearing of a witness. It can, however, form an independent opinion on the inferences to be drawn from or evaluation to be made of specific or primary facts so found, though it will naturally attach importance to the judgment of the trial judge or tribunal…*"

16. I am unable to accept Mr Pachai's submission that rejecting the Board's unhappily expressed finding of discrimination amounts to disturbing a primary factual finding in

the sense disapproved of in *Mutual Holdings (Bermuda) Ltd-v-Diane Hendricks et al* [2013] UKPC 13. Section 21(3) of the Human Rights Act 1981 provides:

> "*(3)An appeal under this section may be made on questions of law or fact or both and the Court may affirm or reverse the decision or order of the tribunal or the Court may substitute its own order for that of the tribunal.*"

17. As far as this ground of appeal is concerned, I would affirm the decision of the Board notwithstanding what I consider, on a fair reading of the entire record, to be a purely technical error of law involving the misstatement of a conclusory finding that unlawful discrimination had occurred.

Was the Appellant deprived of a fair trial by not being afforded an opportunity to meet the case which was found against him?

18. Mr Pachai argued this limb of his client's appeal with great force and skill. It was difficult for Mr Doughty to refute the argument that, if the rules of natural justice were applied as if these were ordinary civil proceedings, the Appellant had, to some extent at least, been deprived of a fair hearing. It was clear that the specific statutory provision which the Board based its finding on was not relied upon by the Respondent.

19. The Respondent's counsel conceded that the absence of suitable statutory procedural rules for boards of inquiry hearings combined with the established view that complaints were equivalent to pleadings which could not be amended once a complaint was referred to a tribunal to be heard was problematic. This why he had not sought to amend his client's case after it was referred to the Board. Critical to disposing of this ground of appeal is a clear apprehension of what the procedural parameters under the Act are as relates to the scope of issues the Board was able to determine. However, the course of the proceedings is best viewed, in the first instance, unfiltered by any particular legal lens.

<u>The Complaints</u>

20. The Respondent filed two complaints. The first complaint dated September 8, 2008 ("the 1st Complaint") made the following primary allegation:

> "*The Respondents are discriminating against the Complainant (a Bermudian) on the basis of his national origin and/or place of origin contrary to the provisions of the Human Rights Act 1981("the Act') by providing a special term and/or condition of employment because he is Bermudian., in contravention of section 6(1)(g) as read with section 2(2)(a)(i) of the Human Rights Act, 1981, and by compensating the Complainant in a discriminatory manner contrary to section 6(1)(bb).*"

21. Mr Pachai rightly submitted that the essence of the 1st Complaint, particularized in 23 paragraphs, was set out in the following paragraph:

> "*19. I believe that foreign carpenters working on the site make at least as much money as myself but also receive time and a half pay for overtime in addition to free housing and transportation.*"

22. A second complaint dated July 14, 2009 ("the 2nd Complaint") only formally added one new allegation, the additional complaint of penalization for making a complaint under the Act contrary to section 8(a). That new allegation was not proved. However, the particulars were expanded to 39 paragraphs and included the following paragraph which supports the basis on which the case was ultimately found to have been proved:

> "*33. As a Bermudian we had no chance of promotion, there is no opportunity for training and coaching by the form carpenters. I believe that they are afraid of Bermudians learning the job and then there will be no need to renew their contracts. I could do the job if trained.*"

23. Mr Pachai described this as a passing reference to the issue of separate lines of promotion, a matter expressly prohibited by section 6(1) (f) of the Act, an allegation not expressly made with reference to that specific statutory provision in either Complaint. What was complained of explicitly in terms of statutory breaches was differential pay (section 6(1)(bb)) and special terms and conditions (section 6(1)(g)). Mr Pachai contended that the latter allegation was, in light of the way the case was argued, limited to pay as well.

<u>The evidence and issues addressed in cross-examination</u>

24. The crucial evidential finding was as follows:

> "*20….The evidence is clear and we find as a fact, that the Respondents had absolutely no intention of training or promoting Bermudians generally, or black Bermudians in particular. We are under no doubt at all that the Respondents wanted 'black faces in the hole', that is, black workers on the construction site in order to support their claims for work permits for contract workers, such as the Polish and Canadian workers mentioned above. The evidence of all witnesses for the Complainant, no matter how unsatisfactory those witnesses might have been, was clear on this point. Indeed, no credible evidence of any form of training for Bermudian labourers was led by the respondents*"

25. Mr Doughty demonstrated that the Appellant's counsel was not only aware of this evidence being led as part of the Respondent's case through the evidence of Mr Roderick Petty (because it was addressed in witness statements) but also dealt with it in cross-examination. Most significantly (Transcript, pages 331-332):

> "***Q.*** *'On starting work with the First Respondent I was told by the Second Respondent* [i.e. the Appellant] *that "The only reason why I need Bermudians*

on the job is to get work permits." He then referred to black Bermudians as being "black faces in the hole" stating that this was the specific type of Bermudian he needed to obtain work permits.' I put it to you that that is completely and utterly untrue?

A. *I put it back to you that I put my hand on the Bible and told you the truth…I was given advice that if I pursued this, likely repercussions would fall upon for doing this, and this has been the case…I stand by what I say. I do reconfirm that I swore an oath to this.*"

26. The witness elaborated upon this later in his cross-examination and, most significantly testified (at 339-340) that he viewed the lack of promotion opportunities as simply part of a wider course of discriminatory treatment:

> "***Q.*** *Okay. So when you say, Mr Petty, that—that Mr Grant should have received the same sort of income as the foreign labour, are you there referring to overtime work and pay?*
>
> **A.** *I'm—I'm referring to all rights afforded to anyone that works here. They should be treated equal.*
>
> ***Q.*** *Are you referring, among other things, to overtime work and pay?*
>
> **A.** *Amongst other things, yes, and chances of advancement.*"

27. The central thrust of this witness' written and oral evidence, together with that of his brother James Petty, was that black Bermudian workers were being hired to do low level work only, regardless of their competencies, to facilitate the acquisition of work permits for foreign workers who the Appellant himself explained were paid directly by foreign sub-contractors. Mr Doughty not only relied upon the fact that Mr James Petty was cross-examined on his assertion that the Respondent was being given work below what he was capable of doing (Transcript, pages 375-376). He also pointed to the following further interchange between the witness and Mr Pachai on the central facts found by the Board (Transcript, pages 373-374):

> "***Q***. *And similarly, when you say in paragraph 7, right, that:*
>
> *'I found this disconcerting as the Second Respondent [the Appellant] confided in me at that time that many of the workers were on parole from the Westgate Correctional Facility and that he needed to have four or five black Bermudian faces "in the hole" in order to get work permits for foreign workers to come in to perform the (the) heavy work at the site.' Again, I put it to you that that is not correct.*
>
> **A.** *And I put it to you that is my sworn testimony and those were his exact words.*"

28. The Appellant was not invited to refute these very specific allegations in the course of his examination-in-chief. He was extensively cross-examined about the central complaint that Bermudians generally were underemployed on the work site and his

apparently unimpressive denials were clearly rejected by the Board. For instance (Transcript, page 533):

> "***Q.*** *But in the four years that Apex was a [going] concern, you never had a trained crew of Bermudian form workers?*
>
> **A.** *We, ah, there wasn't, um—yeah, we didn't have people skilled enough to do what needed to be done.*"

<u>The Complainant's case and the opportunity for the Appellant to meet the systemic discrimination arguments</u>

29. In the course of Mr James Petty's re-examination, a dispute arose as to whether the Tribunal had previously ruled that evidence of systemic discrimination was relevant (Transcript, pages 411-413). The Chair confirmed Mr Doughty's view that the Board had indicated it would take into account systemic matters probative of the Complainant's case:

> "***THE CHAIR****: I think evidence of systemic discrimination, if that's the evidence that Mr Petty… is going to give, may well be relevant to any findings we make in relation to Mr. Grant.*"

30. That the Board considered this aspect of Mr James Petty's evidence of interest is reflected on the final question Mr Petty was asked by the Board itself (Transcript, page 426):

> "***THE CHAIR****: So Andrea actually said to you, or Mr Battiston actually said to you expressly that he wanted to bring in overseas carpenters to do the work and he only wanted to keep enough Bermudians on staff to justify the work permits?*
>
> ***THE WITNESS****: Correct.*"

31. Mr Doughty also relied heavily on the fact that before counsel finished addressing the tribunal in closing submissions, the Board made it clear that it might not accept Mr Pachai's view that its jurisdiction was limited to the specific heads of discrimination set out in the Complaints (Transcript, pages 637-642). The Appellant's counsel did address the evidence which formed the basis of the Board's finding that discrimination occurred in his closing submissions. Mr Doughty, quite cautiously, opened his own closing before the Board by adopting the following nuanced position on the jurisdiction issue (Transcript, page 727):

> "*So, my learned friend has started by taking much issue with the terms of reference. You yourself pointed out that Section 20 of the Act provides your powers and says that it is to the Board to determine whether there has been a violation of the Act. I agree that a broad and purposive interpretation needs to be applied to Section 20, but I would also add that Section 6(1) (g) of the Act should be sufficient, even for these purposes.*"

32. So looking at the matter broadly, it is clear that the Appellant had notice that the idea of Bermudians being hired at a low level with no promotion prospects was a subsidiary part of the Respondent's Complaints. The issue took on heightened significance at the hearing and was extensively canvassed in evidence and dealt with in closing submissions. The Appellant contended that these matters fell outside the Board's terms of reference; the Respondent contended that the matters were competent for the Board to adjudicate and that no need to consider section 6(1) (f) arose (Transcript, pages 629-631). The Board not only agreed with the Respondent's counsel, but went further and found that discrimination had been proved based on a legal ground (section 6(1) (f)) that had not been relied upon but on factual grounds which were quite fully dealt with.

33. This analysis of the record demonstrates that the present case is, in purely evidential terms, far removed from facts which engage a breach of the principle that it "*is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. The function of the judge is to adjudicate on these issues alone*": *Al-Medenni-v-Mars UK Ltd* [2005] EWCA Civ 1041 (at paragraph 21, per Dyson LJ)). However, in purely legal terms, it is impossible to resist Mr Pachai's submission based on this case and other more general authorities on the rules of natural justice that the Board erred in grounding its finding of discrimination on a legal basis upon which the Complainant explicitly did not rely.

34. Whether there was more than a wholly technical breach of the rules of natural justice clearly turns on:

    (a) whether the Board was constrained by the precise legal way in which the Complaints were formulated; and

    (b) further and in any event, whether the Board's primary and conclusory findings established unlawful discrimination contrary to section 6(1) (g) as the Respondent's counsel contended.

Was the Board competent to make legal findings based on grounds not contained in the original Complaints?

35. The question of whether the Board was competent to make findings on grounds not contained in the original Complaints would, in respect of complaints heard by a tribunal after October 26, 2012, be simply answered by reference to the following subsection in section 20 of the Act:

    "*(5) In any proceedings before the tribunal under this Act or otherwise, an interested party may, with leave of the tribunal, amend its terms of reference or add parties to an application on any terms and conditions that the tribunal considers appropriate.*"

36. The present Complaints were heard and determined between 2011 and 2012. There was apparently a widely held view, which the Board explicitly rejected, that a tribunal hearing a complaint under the Act was constrained by the terms of the complaint referred for adjudication to make findings based solely on the grounds of complaint formulated before the matter was referred for adjudication. In my judgment that view was plainly wrong. However, the procedural framework for the adjudication of human rights complaints was at this juncture so unfit for purpose that it is entirely understandable if human rights practitioners found themselves perplexed. I accept entirely that I may have contributed to a narrow view being taken of the powers of a tribunal established under the Act when, in *Burrows-v-Salvation Army* [2004] Bda LR 40, I stated (at page 10) :

> "*The only procedural power conferred by statute on Bermudian boards of inquiry is found in section 8 of the Commissions of Inquiry Act 1935, which provides as follows:*
>
> > *'The commissioners acting under this Act may make such rules for their own guidance and the conduct and management of proceedings before them, and the hours and times and places for their sittings, not inconsistent with their commission, as they may from time to time think fit, and may from time to time adjourn for such time and to such place as they may think fit, subject only to the terms of their commission."*
>
> *In my view this statutory power is analogous to that given to arbitrators or boards of directors to regulate their own proceedings at an administrative level. It is impossible to extrapolate from this the power to make interim rulings on constitutional points or to dismiss or stay proceedings on delay grounds, powers which superior courts alone have the inherent jurisdiction to exercise and which have for decades been delineated by statutory procedural rules. Significantly, the Ontario Statutory Powers Procedure Act, section 25.01, empowers tribunals to determine their own procedures and practices and establish their own rules. If this essentially administrative power was indeed wide enough to encompass pre-emptive dismissal and/or stay powers, the express conferral by other sections in the same statute of Court-like judicial powers in this regard would not have been necessary. This supports the view I take as to the terms and effect of section 8 of the Commissions of Inquiry Act.*
>
> *I reject the submission that section 8 of the 1935 Act, without more, empowers a board of inquiry to stay or dismiss pre-hearing a human rights complaint which has been referred to it on the grounds of, inter alia, delay. I am fortified in the correctness of this analysis by the fact that section 9 of the 1935 Act ("Commissioners to have certain powers of Supreme Court") expressly confers the Supreme Court's powers to summon witnesses on tribunals to which the Act applies. These powers include powers under Order 38 of the Rules of the Supreme Court. Since Parliament expressly conferred the by section 9 the Supreme Court's witness summoning powers, how can section 8 of the Act be construed as conferring by implication a wide range of the Supreme Court's other powers?*

Parliament took what on reflection may be regarded as an ill-advised step in incorporating provisions of the ill-suited Commissions of Inquiry Act into the procedural umbrella under which boards if inquiry under the Human rights Act are required to operate. Boards of inquiry established under the Human Rights Act are quasi-judicial tribunals intended to carry out 'trials' of human rights complaints, to award compensation and to order legal costs, with a statutory right of appeal to the Supreme Court. Quasi-judicial procedural rules ought to have been enacted for boards of inquiry similar to those enacted in the Ontario Statutory Powers Procedure Act."

37. Clearly a statutory tribunal does not possess the same inherent jurisdiction which is enjoyed by a superior court of record. However, a statutory tribunal must, by necessary implication, be conferred the essential jurisdictional competencies for the adjudication of complaints. It is far easier to imply the existence of a power designed to fulfil the statutory object of protecting and enforcing human rights than it is to imply a power to dismiss a complaint before it is heard (the type of power rejected in *Burrows*).

38. The Board in the present case correctly concluded that it possessed the general power to decide the Complaints on grounds that were not originally "pleaded". It rightly appreciated that human rights legislation should be construed in a broad way so as to give effect to the goal of human rights protection. Under the statutory scheme then in force, the statutory scheme was essentially as follows:

- A complaint was filed with the Commission for investigation;
- Meritorious complaints were referred by the Commission to the Minister;
- The Minister in his discretion referred complaints to a board of inquiry.

39. Section 20(1) of the Act provided that: "*A board of inquiry after hearing a complaint shall decide whether or not any party has contravened this Act*…" In the present case, the Board not only took into account the breadth of its general statutory jurisdiction, but also noted that the Minister's reference to them was expressed in similarly broad terms. Bearing in mind that a complaint under the Act is merely designed to initiate an investigation rather than a hearing, in my judgment there can be no rational justification for equating a complaint to a pleading filed before an adjudicative body to whom a dispute has been referred for determination. The notion that a board of inquiry was compelled by Parliament to decide complaints referred solely on the grounds articulated by a complainant before his complaint has even been investigated is both absurd and wholly inconsistent with the manifest purpose of the Act as a whole.

40. For the purposes of the present appeal, Mr Pachai all but conceded that the Board possessed the jurisdiction to entertain new legal grounds by way of amendment to the original Complaints. His main complaint was that it was unfair for the Board to entertain a new basis of liability in the circumstances which occurred in the present case. The Appellant's counsel placed a New Brunswick human rights case, dealing

with a statutory jurisdiction essentially the same as section 20(1) of our own Human Rights Act, before the Court. In *Taylor-v- McCain Foods (Canada)*, the New Brunswick Labour Board in a January 27, 2010 Interim Ruling concluded:

> "*From the foregoing, it is clear that a complaint may be amended by adding a section of the Act which a Respondent is alleged to have contravened, as late as the hearing of the complaint. However, the principles of natural justice require, inter alia, that a Respondent is not caught by surprise, has sufficient notice to prepare his case and interview the relevant witnesses, and is able to examine and cross-examine witnesses on the relevant issues or seek adjournment for further preparation where appropriate. Finally it appears that any perceived disadvantage or prejudice to a Respondent is weighed against the purpose of human rights legislation and provision of relief for the effects of unlawful discrimination against a complainant.*"

41. In *Taylor* the amendment was allowed, adding "physical disability" to an original ground of "mental disability". This helps to illustrate how comparatively minor the change which was adopted by the Board in the present case actually was. In the present case there was no change to the ground on which discrimination was alleged to have occurred at all. The prohibited ground (section 2(2)(a)(i) and, in particular, place of origin) remained unchanged. The only change was to the precise manner in which it was alleged the discrimination had occurred, a change which arose from the factual matrix which (as Mr Doughty's careful analysis of the proceeding Transcript demonstrated) was fully explored in the course of the hearing.

42. I accordingly find that the Board did possess the jurisdictional competence to decide the Complaints on legal grounds not set out in the original Complaints, even though the Board was technically wrong to rely on legal grounds which were not relied upon by the Complainant. Whether this error caused substantial injustice depends on whether the legal 'ground' or mode of discrimination the Complainant relied upon was a valid ground capable of supporting the crucial findings made by the Board against the Appellant.

Did the Board's primary and conclusory findings establish unlawful discrimination contrary to section 6(1) (g)?

The facts relied upon potentially fall within section 6(1)(g) in any event?

43. Section 6(1) as in force at the time of the hearing of the present Complaints provided as follows:

> "*(1) Subject to subsection (6) no person shall discriminate against any person in any of the ways set out in section 2(2) by—*
>
> *(a) refusing to refer or to recruit any person or class of persons (as defined in section 2) for employment;*

(b) dismissing or refusing to employ or continue to employ any person;

(bb) paying one employee at a rate of pay less than the rate of pay paid to another employee employed by him for substantially the same work, the performance of which requires equal education, skill, experience, effort and responsibility and which is performed under the same or substantially similar working conditions, except where the payments are made pursuant to—

(i) a seniority system;

(ii) a merit system; or

(iii) a system that measures earnings by quantity or quality of production or performance;

(c) refusing to train, promote or transfer an employee;

(d) subjecting an employee to probation or apprenticeship, or enlarging a period of probation or apprenticeship;

(e) establishing or maintaining any employment classification or category that by its description or operation excludes any person or class of persons (as defined in section 2) from employment or continued employment;

(f) maintaining separate lines of progression for advancement in employment or separate seniority lists, in either case based upon criteria specified in section 2(2)(a),where the maintenance will adversely affect any employee; or

(g) providing in respect of any employee any special term or condition of employment:

Provided that nothing in this subsection shall render unlawful the maintenance of fixed quotas by reference to sex in regard to the employment of persons in the Bermuda Regiment, the Bermuda Police, the Prisons service or in regard to the employment of persons in a hospital to care for persons suffering from mental disorder."

44. Section 6(1) is expressed to be subject to the provisions of subsection (6). For present purposes, that qualifying subsection is wholly irrelevant as it applies to other grounds of discrimination:

"(6)*The provisions of subsections (1) to (5) inclusive of this section relating to any discrimination, limitation, specification or preference for a position or employment based on sex, marital status, family*

status, religion, beliefs or political opinions, or any advertisement or inquiry in connection therewith, do not apply where a particular sex or marital status, religion, belief or political opinion, or availability at any particular time, as the case may be, is a bona fide and material occupational qualification and a bona fide and reasonable employment consideration for that position or employment."

45. The main scheme of the Act is that section 2 prohibits discrimination on specified grounds and the subsequent provisions of the Act regulate the different ways in which discrimination can occur, or perhaps more accurately, the specific contexts in which discrimination is prohibited. Accordingly discrimination in notices is prohibited (section 3), discrimination in relation to premises is prohibited (sections 4, 4A), discrimination in the provision of goods and services is prohibited (section 5), discrimination by employers is prohibited (sections 6, 6A, 6B), discrimination by organizations is prohibited (section 7), and discriminatory covenants and contracts are prohibited (sections 10-12). In addition, retaliation for making complaints under the Act is prohibited (section 8) and sexual harassment is prohibited (section 9).

46. It was common ground that human rights protections should be interpreted in a broad and generous manner with a view to amplifying rather than restricting the rights protected. With that in mind, the Appellant's argument that section 6(1) should be construed in a manner which allows an employer to escape liability because a complainant who establishes discriminatory treatment within the section has not formally pleaded the precise way in which discrimination occurred immediately provokes an instinctive response of scepticism. In fact, the drafters of the Act made clear that this is not Parliament's presumed intention.

47. Section 6(1) lists eight ways in which prohibited employment discrimination may occur. The first seven are particular and the eighth is a general 'mopping up' clause. The aim of the section is more to encompass as many forms of discriminatory acts as can be identified than to limit the ways in which discrimination may occur. Many of the sub-paragraphs cover similar ground. For instance (bb)-(f) each deal with elements of separate lines of promotion, expressed in different ways, with (bb) alone focussing on pay. However, paragraphs (a) to (f) are all very specific provisions. Paragraph (g) is in my judgment very clearly intended to be a general clause which encompasses any form of discriminatory employment treatment reflected in contractual terms:

> "(g) *providing in respect of any employee any special term or condition of employment…*"

48. Paragraph (g) of section 6(1), therefore, is a general provision which, applying the *eiusdem generis* rule of interpretation is to be read in a way which is coloured by the overall character of the more particular provisions of which it forms a part. As I have observed elsewhere[4]: "*Classically, the eiusdem generis rule entails construing general words at the end of a list of more specific terms with reference to the latter: Bennion, 'Statutory Interpretation', 5th edition, sections 380-384.*" Accordingly, the

[4] *Bermuda Bred Company-v-Minister of Home Affairs* [2015] SC (Bda) 82 Civ (27 November 2015); [2015] Bda LR 106, at paragraph 38.

Board ought to have accepted Mr Doughty's sound submission that section 6(1)(g) upon which he doggedly relied was sufficiently broad to encompass the allegation that, apart from discriminatory pay terms (paragraph (bb)), the Respondent as a Bermudian was subjected to special terms or conditions of employment, namely being hired as a visible and token Bermudian and denied any promotion opportunities while non-Bermudians were allowed to do higher-level work. As a matter of law there was no need for the Board to explicitly base its findings on paragraphs (c) and (f) of section 6(1). The crucial facts potentially fell within the scope of section 6(1) (g).

Did the Board apply the wrong test for discrimination?

49. Mr Pachai referred the Court to persuasive authorities explaining the test for direct and indirect discrimination and made the bare assertion that the Board had applied the wrong test as to what amounted to discrimination. But the only fault he could find with the Decision in purely legal terms was the imperfectly expressed finding (at paragraph 30) which suggested that mere knowledge was enough for the Appellant to be liable. The Board correctly stated the legal requirements for discrimination under section 2 of the Act:

> "*26. We take our starting point to be section 2(2) of the Human Rights Act 1981. That section provides (so far as material) as follows:*
>
> *(2) For the purposes of this Act a person shall be deemed to discriminate against another person—*
>
> *(a) if he treats him less favourably than he treats or would treat other persons generally or refuses or deliberately omits to enter into any contract or arrangement with him on the like terms and the like circumstances as in the case of other persons generally or deliberately treats him differently to other persons because—*
>
> *(i) of his race, place of origin, colour, or ancestry;*
>
> *(ii) of his sex;*
>
> *(iii) of his marital status;*
>
> *(iiiA) of his disability;*
>
> *(iv) he was not born in lawful wedlock;*
>
> *(v) she has or is likely to have a child whether born in lawful wedlock or not; or*
>
> *(vi) of his religious beliefs or political opinions;*
>
> *(b) if he applies to that other person a condition which he applies or would apply equally to other persons generally but—*
>
> *(i) which is such that the proportion of persons of the same race, place of origin, colour, ancestry, sex, marital status,*

disability, religious beliefs, or political opinions as that other who can comply with it is considerably smaller than the proportion of persons not of that description who can do so; and

(ii) which he cannot show to be justifiable irrespective of the race, place of origin, colour, ancestry, sex, marital status, disability, religious belief or political opinions of the person to whom it is applied; and

(iii) which operates to the detriment of that other person because he cannot comply with it.

27. As Lord Neuberger observed in Thompson v. Bermuda Dental board [2008] UKPC 33 at [12, 'Section 2 of the 1981 Act is concerned with interpretation…Paragraph (a) is concerned with direct discrimination, and paragraph (b) with indirect discrimination.'"

50. The Board found that direct discrimination had been proved and, alternatively, indirect discrimination as well. Mr Pachai's submission that "*there is no evidence that the Appellants discriminated against Mr Grant by refusing to train or promote him or by maintaining separate lines of promotion*" was a hopeless one. Independent evidence was led through the Petty brothers that:

    (a) the Appellant himself had expressly admitted that black Bermudians were being hired as a facade to facilitate work permits being obtained for foreign workers to do the 'real' work; and

    (b) the Respondent was being used to do work less challenging than his skills and experience suggested he was capable of performing.

51. The third main ground of appeal must be dismissed. There was clear evidence that the Respondent was being treated less favourably and being subjected to special employment terms and/or conditions because of his place of origin, contrary to section 2(2)(a) as read with section 6(1)(g) of the Human Rights Act 1981. Although the special terms or conditions potentially engaged section 6(1)(c) and/or (f) as well, the evidence accepted by the Board fell within 6(1)(g) in a far more straightforward manner. That is because the Board's central findings were:

    (a) "*we have found discrimination against the Complainant as one of a class of Bermudian labourers*" (paragraph 23);

    (b) "*black Bermudians were employed with no realistic prospect of advancement and no realistic hope of being trained merely to appease the Department of Immigration*"(paragraph 25).

Conclusion

52. The objects of the Act would be seriously undermined if its provisions were to be construed as strictly as criminal statutes and vulnerable citizens required to prosecute complaints with the same rigorous standards as the Crown is held to in pursuing criminal prosecutions against accused persons. The Appellant's complaints might have had more merit if he had been pursuing an appeal against a conviction in the Magistrates' Court. He was not. As Hellman J observed in *Darrell-v-Board of Inquiry* [2013] Bda LR 75 at page 12 in a passage upon which Mr Doughty relied:

> "*The 1981 Act was intended to provide a relatively informal mechanism for resolving complaints by members of the public that their human rights have been breached.*"

53. That mechanism has worked in the present case, as regards the liability phase at least. The Complaint was proved (in part) following a hearing at which the Appellant was ably represented by experienced counsel. The Board found that discrimination was proved; not on the primary pay-related grounds (which were not made out), but on the subsidiary ground that black Bermudian workers were hired as a low-grade employee class with no promotion prospects and with a view to obtaining work permits for foreign workers to do the 'real work'. Although race was mentioned as a feature in the case, the relevant complaint and finding was of discrimination based on place of origin or national origin and not discrimination on the grounds of race. It is almost always possible to find fault with a decision rendered by a fact-finding tribunal. In the present case this Court is satisfied that no substantial injustice flowed from:

    (a) the decision of the Board in the course of the hearing to focus on the ancillary non-pay related discrimination issues which were dealt with in evidence; and

    (b) any imperfections of expression in the way the crucial conclusory findings were recorded in the Board's Decision.

54. The efficacy of the enforcement or remedies dimension of the Act has not been covered in glory by what transpired after the Board delivered its Decision on February 9, 2012, over four years ago. The Board bemoaned the fact that the parties were not prepared to proceed immediately to the compensation phase. This anxiety was propitious. The three respondents to the Complaints all filed appeals which they did not pursue for two years until the Respondent applied to strike them out. The Respondent's corporate employer, the Company, had by then been permitted by its owners to be struck off the register. They have, apparently, left a former senior employee to 'carry the can' on his own. Hindsight suggests that tribunals should

insist that when complaints are proved the relief stage is dealt with as soon as possible thereafter before any appeal rights in respect of liability are pursued.

55. The appeal is dismissed. Unless either party applies within 21 days by letter to the Registrar to be heard as to costs, the Appellant shall pay the Respondent's costs of the appeal to be taxed if not agreed.

Dated this 31st day of May, 2016 ______________________________

IAN R.C. KAWALEY CJ