In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2010: No. 36

IRC SANDYS LTD

Appellant

-v-

EUGENIA THOMAS

Respondent

JUDGMENT (ex tempore)

(In Court)

Date of Hearing: 18th February, 2011

Mr. Christopher Swan, Christopher Swan & Co.,
for the Appellant

The Respondent in Person

Introductory

1. The Appellant in this case is a company which operates the hotel known as 9 Beaches in Sandys Parish and appeals against the decision of the Employment Tribunal dated November 18, 2010 on two grounds. The first ground is that the Employment Tribunal erred in law by finding that in the absence of a formal resignation letter the employee must be deemed to have been forcibly terminated. The second ground of appeal is that the Tribunal erred in law by considering offers of future employment as evidence of a continuation of her employment.

2. The first ground is properly a question of law. The second ground essentially asks the Court to consider whether or not the evidence in question supports the finding that the

Tribunal reached. The decision of the Employment Tribunal sets out in summary form the case of the employer and the case of the employee and then, under two headings, the decision. The first part, which relates to Ground 1, reads as follows:

> "*After careful consideration of the oral and written evidence, the Tribunal has reached the conclusion that, in the absence of a formal letter of resignation, the complainant is deemed to have been laid off, with the usual prospect of re-employment after the prescribed period.*
>
> *Further, the Tribunal has noted that all communication between the parties, during the lay-off period provided the complainant with an assurance of re-engagement. Indeed, there was even consideration that the complainant would be offered an enhanced position with additional responsibilities and commensurate remuneration.*"

3. The second portion of the decision records the "*Determination and Order*" of the Tribunal. It essentially says that based on the evidence presented the Tribunal finds that the employer is in violation of the Act and the complainant is entitled to be compensated under section 23(2) of the Act.

Jurisdiction and record of appeal

4. The jurisdiction of the Court to entertain appeals is set out in section 41 of the Employment Act 2000 and is limited to points of law. The Court in the present appeal was troubled by the fact that the Tribunal had not prepared a comprehensive record of the proceedings before it. The failure to do so in part flowed from the fact that at the initial hearing*s* of this matter neither party was represented and the Court was not requested to order the Tribunal to prepare such a record. What happened is that when the counsel came on board for the Appellant, he requested the Tribunal to provide access to a complete record of the proceedings and that request fell on stony ground.

5. The concept of an Employment Tribunal and appeals to this Court is a comparatively new one. Consideration has not been given, to my knowledge, in any comprehensive way to the need for rules of the Court to govern such appeals. The correct legal position may be that by virtue of section 41(4) of the Act (which references section 62 of the Supreme Court Act)[1] , the rules which govern such appeals are those under Order 55 of the Rules of the Supreme Court 1985, which are made under section 62 of the Supreme Court Act 1905.

6. According to Order 55 rule 1(5), these rules apply to "*any tribunal constituted by or under any enactment other than any of the ordinary courts of law.*" That would seem to apply to an Employment Tribunal. The difficulty is that Order 55 rule 3(1) provides that: "*An appeal to which this Order applies shall be by way of rehearing and must be brought by originating motion.*" That contemplates that the Supreme Court is hearing the entire

[1] Section 41 (4) provides as follows: "*Section 62 of the Supreme Court Act 1905 shall be deemed to extend to the making of rules under that section to regulate the practice and procedure on an appeal under this section.*"

matter *de novo*, which is clearly inconsistent with the intent of the subsequent provisions of the Employment Act 2000.

7. So while some assistance may be had from Order 55[2], the position remains that the Court is circumscribed by the provisions of section 41 of the Employment Act to limiting its consideration to questions of law. Despite the fact that the Court is only considering questions of law, it is obvious that in certain rare cases it may be necessary for the Court to consider whether sufficient evidence existed to support a factual finding reached by the Employment Tribunal. Where insufficient evidence exists to support a factual finding, that fact[3] will constitute an error of law. In the present case while the Appellant used its best endeavours to place before the Court all the documents which were before the Tribunal, the Respondent was able to point to two documents which she believed were before the Tribunal which were not presently before the Court.

8. That left the Court in the position that it was unable to properly adjudicate the second ground of appeal, which involved a consideration of the evidence, and possibly required the Court to request the Tribunal to prepare a supplementary record. Bearing in mind the amount in dispute in this case[4], that procedural hiccup would result in the proceedings being managed in an un-commercial and inefficient manner.

Disposition of appeal

9. My initial view was that the complaint of an error of law was not a compelling one because it seems clear from the decision of the Tribunal that in addition to relying on the absence of evidence of a formal resignation, The Tribunal also considered the other evidence generally. After all, according to the terms of its decision, it reached its conclusion "[a]*fter careful consideration of the written and oral evidence.*" Nevertheless, at the end of the day, I am satisfied that there is a real risk, at a minimum, that the Tribunal did err in law in concluding that "*in the absence of a formal letter of resignation, the complainant is deemed to have been laid off*". The language used does suggest that the Tribunal felt that the absence of a formal letter of resignation had the effect of shifting the onus of proof in some way and that this may have coloured its final conclusion.

10. The scheme of the Employment Act is clearly one in which the Employment Tribunal is meant to decide all matters of fact bringing to bear experience of the employment market. It is intended to be a specialist tribunal. In my judgment there is no question but that it would be wrong for this Court to in any way substitute its view of the facts in this appeal. So the decision of this Court is that the decision of the Tribunal should be set aside on the grounds of an error of law and the matter remitted to the Tribunal for rehearing according to law.

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[2] Order 55 does not appear to explicitly empower this Court to order tribunals to produce a comprehensive record including all documents which were before them.
[3] I.e. the fact of insufficiency.
[4] $8640.

11. That said, in the course of the hearing I did invite counsel for the Appellant to remember the general duty in civil cases to seek to reach settlements. I hope that in the interim, before the matter is reheard, the parties may be able to reach a compromise that will enable the matter to be brought to an end in an expeditious manner.

Costs

12. The jurisdiction for costs in the Employment Act 2000[5] is a *sui generis* one; it is unique to this statutory context. The ordinary rule is that a successful party has their costs. In an employment context, the Court must have regard to the inequality between the parties. Also, in the present case, this is an appeal based on an error of law made by the Tribunal in circumstances where each party appeared in person before the Tribunal and neither party made submissions as to the law. In these circumstances it would be grossly unfair to the Respondent for her to be required to bear the costs of the appeal and I would be inclined to make no order as to costs. I would leave open the question of whether or not the Appellant can seek costs as against the Tribunal.

13. [The Appellant's counsel applied for costs]. 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 has not had counsel or led the Tribunal into an error of law, and has to pay costs. It would potentially discourage employees from using this statutory framework because the burden of costs on an ordinary person would be punitive. It would be different if this were a case brought by an insurance underwriter earning several hundreds of thousands of dollars a year, hiring the best possible lawyer and they had raised some clever legal argument which was completely wrong, forcing the employer to bring an appeal which was vigorously contested on points of law which they had lost. That would perhaps be a case where the ordinary rules of costs should be followed. In my judgment, the idea of requiring an employee who has been awarded $8000 by the Tribunal to pay the costs of a successful appeal in these circumstances is unthinkable.

14. Here the employer has won on a technicality. The Court has not decided that the decision on the merits was wrong. All the Court has decided is that the Tribunal misdirected itself in law and may have reached a wrong decision on the merits. The present statutory context is modelled in part on UK legislation, under which it would be very unusual for an employee appearing in person would be ordered to pay the costs of an appeal. Absent exceptional circumstances, this Court ought not to make such an order.

[5] Section 41(3) provides: "*On any such appeal, the Supreme Court may make such order, including an order as to costs, as it thinks fit.*"

15. I therefore make no order as to costs (as between the Appellant and the Respondent). Counsel is at liberty to consider whether or not an alternative remedy may be to apply for costs against the Tribunal. That matter is not before me and I express no view on it.

Dated this 18th day of February, 2011 _____

KAWALEY J