In The Supreme Court of Bermuda

CIVIL JURISDICTION

2012 No: 151

BETWEEN:-

ISLAND CONSTRUCTION SERVICES CO LTD

Appellant

-v-

MORRIS BRANGMAN

Respondent

RULING

(In Court)

Date of Hearing: 21st January 2013
Date of Ruling: 22nd January 2013

Ms Simone Smith, Charter Chambers, for the Appellant
Ms Nadia Hamza, Nadia W Hamza, for the Respondent

1. This was an appeal from a decision of the Employment Tribunal ("the Tribunal"). After hearing from both counsel, I dismissed the appeal by consent. Other than to record my thanks to counsel for their precise and focused submissions, I need not address the particular facts of this case. Save for one issue.

2. The appeal was brought under section 41 of the Employment Act 2000 ("the Act"), which provides that a party aggrieved by a determination or order of the Tribunal may appeal to the Supreme Court on a point of law. Thus it is not for the Court to substitute its view of the facts. However, the Tribunal will err in law if it reaches a decision that was not supported by the evidence. That was one of the grounds of appeal in the instant case.

3. On 24th June 2012 the appellant's counsel, Ms Smith, wrote to the Tribunal requesting a copy of its record of the hearing. She needed the record in order to try and make good the appellant's contention, which was disputed by the respondent, that the Tribunal had failed to take material evidence into account. Ms Smith received no reply. She followed up the letter with five telephone calls. She was given to understand by Tribunal staff that, other than the Tribunal's written decision, there was not much else on file.

4. I am not clear whether the Chairman took no notes of the evidence, which would be surprising, or whether his notes had not been put on file. The upshot was that this Court was not, as it should have been, supplied with a record of the evidence led at the hearing.

5. Had the matter been raised at the directions stage, which would be the appropriate time to raise it, I would have been minded to make an order directing that the Chairman supply the parties with a copy of his notes. However the matter was listed before me today for the substantive hearing of the appeal. It had twice been listed previously for this purpose and twice adjourned, once at the instance of the appellant and once at the instance of the Court. In the circumstances a further adjournment would not have been a proportionate use of court time or the parties' resources.

6. This is not the first time that the parties to an appeal from the Tribunal have had difficulty in obtaining a record of the Tribunal hearing. In IRC Sandys Ltd v Eugenia Thomas [2011] Bda LR 10, this Court encountered a similar situation. Kawaley J (as he then was) noted at paragraph 4 of his judgment:

"*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 hearings 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.*"

7. In that case there were two grounds of appeal. The appeal succeeded on the first ground but the Court found at paragraph 8 of its judgment that in the absence of a comprehensive record of the Tribunal hearing it was unable to properly adjudicate the second ground.

8. The absence of a full record of the hearing will not necessarily have this result. Generally, I would expect the presumption of regularity to apply. See the judgment of Kawaley J in this Court in Matthews v Bank of Bermuda Ltd [2010] Bda LR 56 at paragraph 30. That is to say, in the absence of a good reason to suppose otherwise, the Court will proceed on the basis that the Tribunal took into account all the material evidence placed before it. The Tribunal is not obliged to identify every piece of evidence that it took into account. As Lord Clyde stated 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.*"

9. It is nonetheless important that the Chairman of the Tribunal takes 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 the proceedings before the Tribunal for the purposes of the appeal. Thus, in Matthews v Bank of Bermuda Ltd, Kawaley J noted at paragraph 3 of his judgment that: "*The Chairman prepared typed notes of the hearing which constituted the Appellant's record in this matter.*" The notes will not only assist the Tribunal in preparing its written decision. 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. The appellant will not require a copy of the note of evidence in every case. But if the appellant does require a copy, it should be made available on request: absent exceptional circumstances, an order from the Court for its production should not be necessary.

11. In IRC Sandys Ltd v Eugenia Thomas, Kawaley J noted at paragraph 5 of his judgment that: "*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 present case underlines the need for such rules. They would provide procedural guidance to all concerned and help establish uniformity of practice.

12. This might be accomplished by amending Order 55 of the Rules of the Supreme Court, which is headed "*Appeals to the Supreme Court from Court, Tribunal or Person: General*", so that it covers appeals on a point of law. At present, as Kawaley J pointed out at paragraph 6 of his judgment, Order 55 applies only to an appeal by way of rehearing. Alternatively, the Minister could issue rules in the form of regulations under section 45(1) of the Act, which provides that: "*The Minister may make such regulations as he considers necessary or expedient to give effect to this Act*". Either route would suffice.

Dated this 22nd day of January, 2013 _____

Hellman J