In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2019: No. 43

B E T W E E N:

EARLSTON R. BRADSHAW

Appellant

- and -

RAYNOR'S SERVICE STATION LTD.

Respondent

RULING

Employment Act 2000 –- Appeal from second Employment Tribunal decision – unfair dismissal – Strike out application of Notice of Appeal pursuant to section 3(8) of the Employment Act (Appeal) Rules 2014 - appeal grounds are vague or general or disclose no reasonable ground of appeal — abuse of process in delay in prosecuting appeal

Date of Hearing: **16 June 2021**
Date of Judgment: **11 August 2021**

Appearances: Bruce Swan, Bruce Swan & Associates, for the Appellant
LeYoni Junos, McKenzie Friend, for the Respondent

Judgment of Mussenden J

Introduction

1. This matter commenced in the Appellate Jurisdiction of the Court by the filing of a Notice of Appeal on 29 November 2019 by the Appellant pursuant to section 41 of the Employment

Act 2000 (the "**Act**") in respect of a decision of the Employment Tribunal dated 8 November 2019 (the "**Decision**") in favour of the Respondent.

2. On 5 January 2021, the Respondent filed a Summons to strike out the Appellant's Notice of Appeal pursuant to rule 3(8) of the Employment Tribunal (Appeal) Rules 2014 (the "**Appeal Rules**") on the basis that (a) none of the grounds of appeal disclose any reasonable ground of appeal; (b) the Appellant has failed to prosecute his appeal in a timely fashion; and (c) there having been two Employment Tribunal hearings already, it would be a waste of time and resources to have a third Employment Tribunal hearing.

3. The parties filed submissions with the Appellant opposing the strike out application. Mr. Reginald Raynor, owner/operator of the Respondent service station, swore an affidavit dated 6 April 2021, in answer to the Appellant's submissions about the cause of the delays between the first and second days of the hearing before the Employment Tribunal. The affidavit had an Exhibit "**RJR-1**".

4. This Ruling is in respect of the application to strike out the grounds of appeal.

Brief Facts

5. The Appellant employee worked for the Respondent service station as a gas pump attendant. The Respondent employed various other employees at the service station including a manager and a cashier.

6. On 22 January 2015 a customer attended the Respondent's service station (the "**Premises**"), and upon entering the indoors cashier area, dropped a $50 note which landed on the floor. About that same time, the Appellant, as part of his duties, also entered the indoor cashier's area to deal with cash he had received from other customers in payment of the gasoline they were purchasing. The Appellant became aware of the $50 note on the floor and picked it up, putting it into his pocket. He then performed his duties in respect of the other customers' cash, returning to the outside forecourt of the Premises. He did not hand the $50 that he

picked up from the floor to the cashier or the manager. Once the customer realised that he had misplaced his $50 note, he made some attempts to find and recover it, including a query with the cashier in the cashier area and with the Appellant, who then handed the same $50 note to the customer.

7. As a result of the Respondent's inquiry into these events, the Appellant attended a meeting with Mr. Raynor, who summarily dismissed the Appellant for serious misconduct pursuant to section 25 of the Act, having found that the Appellant was guilty of theft as well as insubordination arising out of his conduct at the meeting. It was Mr. Raynor's belief that when the Appellant put the money in his pocket, he intended to keep it.

8. The Appellant filed a complaint of unfair dismissal and appeared before the Employment Tribunal (the "**First Tribunal**") which found in the Appellant's favour and awarded him compensation.

9. The Respondent appealed to the Supreme Court and Kawaley CJ (as he then was) dismissed the appeal. The Respondent then appealed to the Court of Appeal claiming that both the First Tribunal and the Chief Justice made errors of law. The Court of Appeal allowed the appeal and remitted the matter to the Employment Tribunal to be re-heard by a differently constituted panel (the "**Tribunal**").

10. This is the Appellant's appeal from the Tribunal's Decision. Any references to the Decision or to paragraphs of the Decision are in respect of the Decision of the second Employment Tribunal.

Amendment to the Employment Act 2000

11. On 1 June 2021, substantial amendments to the Employment Act 2000 came into operation. One of the changes included the repealing of section 41 of the Act which, before being repealed, provided at subsection (1) that *"a party aggrieved by a determination or order of the Tribunal may appeal to the Supreme Court on a point of law."*

12. The amendments implemented a new section, 44O of the Act, on "*Appeals*". However, this appeal is being heard under provisions of the pre-amendment section 41 of the Act.

The Strike-out Application

13. Section 41 of the Act provides for an appeal on a point of law. Rule 3(8) of the Appeal Rules provides as follows:

> *"No ground which is vague or general in terms or which discloses no reasonable ground of appeal shall be permitted except the general ground that the determination or order is against the weight of the evidence, and any ground of appeal or any part thereof which is not permitted under this Rule may be struck out by the Court of its own motion or on application by the respondent."*

14. The start point is that the appeal ground must be on a point of law under section 41 of the Act. The next step is that under the Appeal Rules, no ground shall be permitted which is vague or general in terms or which discloses no reasonable ground of appeal. The only exception is the general ground that the determination or order is against the weight of the evidence (the "**Exception**").

15. Thus, where the grounds of appeal fail to meet these requirements, then the Court is obliged to strike out such grounds on an application by a respondent or of its own motion.

The Law on Strike Out Applications

16. The law on strike out applications in respect of pleadings and causes of action has been stated in various cases in Bermuda law. I am mindful of those principles in relation to a strike out application in relation to the grounds in a Notice of Appeal, albeit the grounds should be on a point of law. I will apply equally great caution in respect of these applications.

17. In *Electra Private Equity Partners* referred to by Stuart-Smith JA in *Broadsino Finance Co Ltd v Brilliance China Automotive Holdings Ltd* [2005] Bda LR 12 , the Court stated:

> *"... the Court should proceed with great caution in exercising its power of strike-out on such a factual basis when all the facts are not known to it, when they and the legal principle(s) turning on them are complex and the law, as here, is in state of development. It should only strike out a claim in a clear and obvious case. Thus, in McDonalds's Corp v. Steel [1995] 3 Al ER 615 at 623,Neill LJ, with whom Steyn and Peter Gibson LJ agreed, said that the power to strike out was a Draconian remedy which should be employed only in clear and obvious cases where it is possible to say at the interlocutory stage and before full discovery that a particular allegation was incapable of proof."*

18. The principles of law applicable to strike out applications were also set out more recently in the matter of *David Lee Tucker v Hamilton Properties Limited* [2017] wherein Subair Williams AJ (as she then was) stated that "*a strike out application, in reality, is a component of good case management. Where the pleadings are so bad on its face and so obviously bound for failure, the Court should strike out.*"

The Grounds of Appeal

19. On the analysis above, it becomes relevant then that the Court, in considering the strike out application, should consider, provisionally, the grounds of appeal to assess (a) that they are grounds addressing points of law only; and if so, (b) assess the conditions under rule 3(8) of the Appeal Rules.

20. The grounds of appeal are:

Ground 1 – "*The Honourable Tribunal, hereinafter referred to as HT, made fundamental errors in law and procedure and thereby misdirected themselves on the facts, the applicable law and prejudiced the Appellant through the procedural errors as they were interpreted by the HT*."

Ground 2 – "*Firstly, the hearing commenced on 26th July 2018 and to no fault of the parties but by the illness of then counsel and the influx of time when the employer was not ready to proceed with dates and other events, the hearing did not continue for another almost 15 months on 11th October 2019. To this end, it is contended that the hearing, although notes were taken, was not resumed within sufficient time that the HT maintained the clarity of the proceedings and were misdirected by its recollection of the notes. This is evident in that the HT stated in its ruling that the employer was not cross examined by the AE when it was clear that both employers were cross examined extensively.*"

Ground 3 – "*Secondly, the HT appeared to give too much attention to the opening remarks of the ER as well as her narrative of the video evidence that were both full of her opinion and an attempt by her to give evidence in the case."*

Ground 4 – "*Further, the procedure chosen by the employee to try to determine the ownership of the $50 note was not unlawful when in the circumstances, the customer, a relative of the employer, was:*

a. *Nowhere near the $50 note when he picked it up; and*
b. *There was no set policy or procedure in place, verbally or written on what to do upon finding money.*
c. *That securing the $50 whilst completing the servicing of another customer, did not amount to stealing it especially since he can be clearly heard to tell the customer who claimed it that he was coming right back."*

Ground 5 – "*In addition to this, when the employers invited the employee to the office to discuss the incident, they ought to have explained prior to the meeting exactly why he was invited to the office so that the employee could have had ample opportunity to either bring a friend/co-worker or a representative to the*

meeting with him. Instead, the employers sprung the meeting upon him then accused him of being insubordinate to them in the absence of any witnesses or proof other than their collective word that was self serving."

Ground 6 – "*The HT failed to consider the credibility of the employers in light of the major revelation that for many years, they had been taking the weekly employee contributions from this employee, yet alone others, and not paying into the Social Insurance Fund nor the Employee Pension Scheme. This amounts to theft and the employers, whilst admitting that they were 'in arrears' gave no proof of the payments to the funds, the dates of said payments or any proof that they had indeed caught up with the required payments.*

The Submissions

21. The Respondent submits three primary points in support of its application to strike out the Appellant's Notice of Appeal, they are:

i. *That the Appellant's grounds of appeal are not made on a point of law, as required by section 41 of the Employment Act 2000; and or*

ii. *That all of the grounds cited in the Appellant's Notice of Appeal "disclose no reasonable ground of appeal" and therefore should not be permitted to proceed, in accordance with Section 3(8) of the Employment Act (Appeal) Rules 2014; and or*

iii. *That the Appellant neglected to advance the Appeal for nearly one year, and only took action to specifically derail the Respondent's application to the Court of Appeal for his costs after his success at the second Employment Tribunal. This constitutes a failure, on the part of the Appellant, to advance the appeal; and an abuse of process."*

22. In my view, grounds 1, 3, 4, 5 and 6 should be struck out for the reasons as set out below.

Ground 1 – Introductory Ground

23. Ms. Junos submits that Ground 1 is *"vague and general, and is redundant in that it is a lead into the remaining grounds."* In my view, Ground 1 satisfies the test that it is on a point of law in that the Tribunal made errors in law and procedure and thereby misdirected itself in the facts and law. However, in my view, the ground appears to be vague and general in terms in that it is wholly introductory in nature to the remaining grounds of appeal. This is evidenced in the wording in Ground 2 which starts "Firstly, …". Next, I have considered whether this ground falls into the Exception under the Appeal Rules of a general ground that the Decision is against the weight of the evidence. In my view, the ground of appeal is not stated in those terms expressly or by implication as it seems to me that it is worded to introduce, or lead into, the grounds of appeal that follow. On that basis, in my judgment Ground 1 should be struck out as being vague and general in terms as well as it does not meet the Exception.

Ground 2 –Delay

24. Ground 2 complains of the delay between the first and second hearing days, which has a delay period of some 15 months. Ms. Junos submitted that the Respondent was not responsible for the delay. Also, the Tribunal had made some efforts to set the matter for a hearing but that it was the Appellant's then counsel, Mr. Woolridge, who caused the bulk of the delay due to various circumstances including falling ill, being on vacation and his efforts to obtaining a limited practising certificate. In Mr. Raynor's affidavit he provides explanations for the various delays. In Exhibit RNR-1, there appears between pages 1 and 20 a series of correspondence between the Tribunal's administrative assistant, Shawne Stephens, and the parties in respect of having the matter set down for hearing. It was evident that the Tribunal was interested with getting on with the hearing, but it was met with several difficulties in its attempt to proceed.

25. Mr. Swan submitted that there were delays caused by Mr. Woolridge, the Tribunal and to some extent, the Respondent. He submitted that the extraordinary time between the hearing dates caused the Tribunal to misdirect itself on the evidence, in particular the cross examination of Mr. Raynor. Further, as a result of the delay, it appeared that the Appellant did not have a copy of any trial notes from the first hearing date, although Mr. Swan was not aware if Mr. Woolridge had requested such a copy. However, Ms. Junos submitted that it appeared that the secretary to the Tribunal provided Mr. Woolridge with a copy of her 'Administrator's Notes'.

26. In my view, first this ground of appeal is on a point of law, in respect of the possibility of unfairness caused by the inordinate delay in the conduct of the hearing. Next, it is a specific ground of appeal which is not vague or general in terms. In my view, the ground of delay discloses a reasonable ground of appeal.

27. On a provisional view of the Record and the evidence there is indeed inordinate delay with responsibility of varying degrees to all parties. The issue to be examined is whether or not the delay contributed to any unfairness to the Appellant before the Tribunal. Significantly, Mr. Swan concedes that there is no indication in the Decision that any witness had difficulties in recalling their evidence due to the delay. His main contention was the effect of the delay on the Tribunal and its decision making.

28. In my view, these are all matters that should be fleshed out on appeal with a purposeful review of the Record and any other evidence. On that basis, I decline to strike out Ground 2. However, my provisional view, is that there was never a complaint about the delay affecting fairness or at all when the hearing resumed on the second day. Even at this stage, Mr. Swan does not identify difficulties with witnesses or any concrete prejudice to the Appellant. In light of the authorities in respect of delay, my provisional view is that the Appellant has significant hurdles to overcome to be successful in persuading the Court to allow the appeal.

Ground 3 – Opening Remarks

29. Ground 3 argues that the Tribunal gave too much weight to the opening remarks of the Respondent's McKenzie Friend, and that she attempted to inject her own evidence in the case. This ground is on a point of law in that it asserts that the Tribunal took into account irrelevant matters. However, in my view this is not a reasonable ground of appeal. In essence, it is in respect to the findings of fact by the Tribunal. In any event, the opening remarks by Ms. Junos, as conceded by Mr Swan, made references to the video, the transcript and any evidence that the Tribunal could expect to hear during the course of the hearing. In fact, when Mr. Swan took the Court through the Tribunal's decision to identify any paragraphs that would support this ground of appeal, it became apparent that the Tribunal relied on their assessment of the evidence and not any remarks advanced by the representatives in their opening statements. In the end, Mr. Swan further conceded that he could not identify a paragraph in the Tribunal's decision where it plainly showed that they gave weight to the submission of Ms. Junos in opening remarks as opposed to the evidence it heard and assessed. In reply, Ms. Junos confirmed that the submissions on the video did not come until the second day of the hearing in October 2019 when the video was first shown.

30. The Tribunal, which comprises experienced members, was able to differentiate oral arguments and witnesses' evidence when arriving at their conclusion. Furthermore, under the heading "Determination and Order", the Tribunal clearly states that they have reached their determination "*Having examined all the evidence presented through the written witness statements, oral delivery of all parties and examination of the video and transcript, it is the Determination of this Tribunal …*". In my judgment, Ground 3 should be struck out as it is not a reasonable ground of appeal.

Ground 4 – Issue of Theft

31. Ground 4 complains about the findings of facts about the procedure used by the Appellant in determining the ownership of the $50 note on the Premises. The Appellant relies on several facts to support this ground of appeal including that the Appellant's actions, by securing the $50 whilst completing servicing of another customer, did not amount to stealing. It takes some effort to discern that the Appellant is appealing on a point of law in that the complaint

is that the Tribunal did not make a finding about the issue of whether or not there was theft by the Appellant. I am then mindful of the Appeal Rules about whether this is a reasonable ground of appeal. In my view, in essence this ground is a challenge to the findings of fact by the Tribunal. In is clear to me that the Tribunal dealt with the complaint on policies and procedures relating to lost items found on the Premises where it stated as follows*:*

> *"86. The Tribuna1 examined the transcript and the video recording of the event and questioned the witnesses accordingly.*
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> *87. The AE [the Advisor to the Employee, i.e. Mr. Woolridge] would have the Tribunal believe that the Employee was unaware of the owner of the $50 bill which he found on the floor and that he had inquired into the ownership by asking if it belonged to anyone.*
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> *88. This is not confirmed by the evidence presented. To the contrary, the video shows that the Employee found the bill and placed it in his pocket. When approached by the customer he denied any knowledge of the money.*
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> *89. The video also does not support the Employee's claim that he asked if anyone had lost the $50 bill.*
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> *90. The video further records the Employee approaching the Cashier to hand in the receipts collected from customers at the pumps. The Tribunal believes that at this time the Employee had ample opportunity to hand over the money to the Cashier. He did not do so but returned to the pumps to continue selling gas.*
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> *91. The AE would have the Tribunal believe that there was no intent by the Employee to deprive the Customer of his property but that it was a simple lapse in behaviour. In addition, the Employee had the bill in his possession for a very short period and in the end did return it to the owner.*

92. The Tribunal emphasizes that the length of time that the Employee had the money in his possession was not critical in their decision and do not believe that the Employee was forthcoming in denying knowledge of the ownership of the money. [emphasis added]

93. If in fact the Employee was not sure of the ownership of the money, why did he finally return it to the Customer to whom he believed it did not belong?

94. The Tribunal points out that the correct procedure for the Employee to have followed if he were unsure of the ownership of the bill, was to return to the Cashier and hand it over to her. This would then put the onus on the Cashier to determine the correct ownership. To the contrary, he handed it instead to the Customer to whom he claimed it did not belong." [emphasis added]

32. In my view, the thrust of the ground is that the Appellant desires for this Court to adopt a different view of the facts, no doubt in his favour. The Tribunal made no pronouncement on the lawfulness of the Appellant's 'procedure' in determining ownership. The Tribunal found that the Appellant's evidence was inconsistent with the video evidence and transcript tendered at the hearing. The Tribunal considered all the relevant evidence in reaching the decision that it did. They did not accept the Appellant's version and found that he was not forthcoming in denying knowledge of owner ship of the $50 note. They did not find him to be credible.

33. Ms. Junos directed the Court to the judgment of Kawaley CJ when this matter was first appealed from the First Tribunal[1], where he said:

"As I commented in the course of argument, where a trier of facts sees and hears the witnesses and rejects an allegation of dishonesty, an appellate tribunal is in no place to reverse the primary findings reached by the fact-

[1] *Raynors Service Station v Earlston Bradshaw* [2016] SC (Bda) 60 App, 3 June 2016

finding tribunal as the Judicial Committee of the Privy Council held in the Bermudian case of Mutual Holdings (Bermuda) Ltd-v-Diane Hendricks et al [2013] UKPC 13."

34. In *Mutual Holdings (Bermuda Ltd v Diane Hendricks et al* [2013] UKPC 13, Lord Sumption delivering the lead judgment says this at paragraph 28:

> *28. An appellate court is rarely justified in overturning a finding of fact by a trial judge which turns on the credibility of a witness. There are particular reasons for caution in a case like this. The allegation was one of fraud, which fell to be proved to the high standard on which the courts have always insisted, even in civil cases. The critical issues were (i) what was said at an informal and undocumented meeting eight years before the trial, and (ii) what the four personal Defendants believed to be the exposure of the Hendricks and AMPAT to losses that penetrated through the stop loss layer. Any findings about these matters necessarily had to be based on the oral evidence of those Defendants and of Mr Bossard and Mr Agnew. The Judge had to assess their character, the honesty and candour of their evidence, and the quality of their recollection. As Lord Hoffmann observed in Biogen Inc v Medeva Plc [1997] RPC 1, 45,*
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> > *"The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, la vérité est dans une nuance), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."*

35. These were all matters for consideration by the Tribunal. Based on the evidence, there appears no justifiable reason why this Court sitting on appeal should disturb those findings. In my judgment, this ground of appeal should be struck out as it is not a reasonable ground of appeal.

Ground 5 – Whether Meting was Unfair

36. In respect of ground 5, the Appellant complains that when he was called upon to meet with Mr. Raynor about the $50 note, due process was not followed insofar as his being given notice and having a friend attend the meeting with him. Again, it takes some effort to discern that the ground of appeal is on a point of law that the Tribunal meeting was unfair. However, in my view, it is not a reasonable ground of appeal. The conduct and events of the meeting were matters of fact which were properly before the Tribunal. Mr. Swan submits that similar to unionised persons, there should have been an opportunity afforded to the Appellant to have a representative in the meeting with him. However, Mr. Swan conceded that there was no evidence of the Appellant having requested for a friend or representative to attend the meeting with him. There was also no evidence that the Appellant wished to stop the meeting so that he can secure the attendance of a representative or friend. In my view, the Tribunal rightly considered the evidence before it of the conduct and behaviour of the Appellant at the meeting and had an opportunity to assess the Appellant's credibility on the issue.

37. In my judgment, this ground appeal is not a reasonable ground of appeal. In my judgment, Ground 5 should be struck out.

Ground 6 – Character of Mr. Raynor

38. In respect to Ground 6, Ms. Junos characterised this ground as a *"red herring"* and that the argument was primarily pleaded to besmirch the character of Mr. Raynor. The Appellant argues that this ground concerns the credibility of Mr. Raynor as a witness inasmuch that he himself was involved in, what the Appellant alleges, theft of funds from the Appellant by failing to pay the money deducted from his salary to the relevant statutory schemes. In my

view, as a start point, a ground of appeal complaining that the Tribunal failed to assess the credibility of one or more witnesses would be an appeal on a point of law. However, this ground of appeal is based on the assertions that Mr. Raynor had committed theft in respect of pension payments and a lack of proof that he was not paid up on those payments.

39. In my view this ground of appeal is not a proper ground of appeal for several reasons. First, what has been described by the Appellant in submissions only, as theft by Mr. Raynor is wrong as it is without foundation. In the cross-examination of the Manager [*Decision paragraphs 52 – 54*], she stated that the accountant was responsible for payment of staff wage deductions towards pension under her supervision. She went on to say that the lack of payment was an error, contributions had been refunded to the Appellant and that all payments "*have now been made*". In the evidence, there was no allegation against or admission of theft by Mr. Raynor and so it boggles the mind as to how, in submissions, an assertion of theft becomes the basis for this ground of appeal. Second, the ground appears to place a burden on the Respondent to satisfy the Tribunal that it had made payments to the pension funds, the date of the payments and that they had caught up with the payments. However, there was no such burden on the Respondent to provide any such evidence to the Tribunal, the issue being raised on cross-examination by the Appellant. Third, the issue of credibility would be a matter for the Employment Tribunal which was able to assess not only Mr. Raynor, but other witnesses, and conclude that the Respondent's decision to summarily dismiss the Appellant was fair in all the circumstances.

40. In any event, it would seem to me that the Tribunal aptly dealt with this matter at paragraphs 95 and 98 of its decision:

> *"[95] With respect to AE's inference that the Employer dismissed the Employee because he was somehow a threat to management with his knowledge of the non-payment by the Employer of pension payments, no convincing evidence was produced to support the link between the allegation and the non-payment except AE's belief.*
>
> *...*

[98] The Tribunal is not convinced by AE's plea that the Employee was a model Employee as his employment records say the contrary. In fact, testimony indicated that the Employee once had been dismissed from the Company and been subsequently rehired."

41. Therefore, as the Decision stated, there is no nexus between the Appellant's allegation, so far as the Respondent's failure to make timely statutory payments is concerned, and the incident which gave rise to the Appellant's summary dismissal. The ground of appeal is not a proper ground of appeal and it should be struck out.

Abuse of Process

42. In the Summons for strike out dated 6 January 2021, the Respondent applies for the Notice of Appeal to be struck for the delay in prosecuting the appeal. The Respondent submitted that it is an abuse of process for the appeal to proceed to a substantive hearing on the ground that the appeal was only proceeded with once the Appellant was made aware of the Respondent's application for an Order for Costs to the Court of Appeal filed in March 2020. The main complaint is that the Notice of Appeal was served just 6 days short of one year after it was filed, thus this is a clear failure to prosecute the appeal in a timely manner.

43. There is no evidence filed by any of the parties in respect of this application. Therefore, the Court is unable to consider any reasons for the delay after the Notice of Appeal was filed or for the motivation to bring on the appeal to make an assessment of abuse of the Court's process. The submissions are not evidence. Therefore, I decline to strike out the Notice of Appeal on this ground.

Possibility of a Third Tribunal Hearing

44. Also in the Summons for strike out dated 6 January 2021, the Respondent applies for the Notice of Appeal to be struck out on the basis that the Appellant seeks a third hearing before an Employment Tribunal. The Respondent submits that this would be a huge waste of the

Courts time and resources. Further, the Respondent claims that the Appellant has never filed one document of evidence, has never filed a sworn witness statement, nor produced any witnesses. Having given oral evidence, the Tribunal assessed the evidence of the witnesses including the credibility of the Appellant and gave its Decision.

45. Over 4 years ago, in the Court of Appeal judgment dated 16 June 2017 in this matter *Raynor's Service Station –v- Earlston Bradshaw* Court of Appeal [2017] Civ Appeal No. 12 of 2016, Baker P stated in the final paragraph as follows:

> *"33. With some reluctance, because of the time that has passed and the disproportionate amount of costs that are being incurred, I would allow the appeal and remit the case for re-hearing before a differently constituted Tribunal."*

46. In respect of this application to strike out, I have struck out all but one ground of appeal although providing a provisional view that it seems to me that the Appellant has some serious hurdles to overcome on the grounds of delay between the two hearing dates. Further, in the preceding section, I declined to strike out the Notice of Appeal as an abuse of process. However, I do note that the Notice of Appeal was filed on 29 November 2019, directions were ordered on 7 January 2021 and Notices of Hearing were issued for 7 April 2021 and then for 16 June 2021 when the strike out application was heard.

47. In light of the case authorities about striking out as set out above, if there is merit in the remaining ground of appeal then the Appellant should be allowed to argue it. In my view, the appeal should not be struck out just because the Appellant wishes to advance his appeal and if successful, seek a third hearing before the Employment Tribunal.

48. However, in light of my provisional view about the sole remaining ground of appeal of delay, some serious consideration should be given to the time that has passed since 22 January 2015, some 6 ½ years ago, when the infamous $50 note was dropped on the floor of the Premises and the costs that have been incurred since, along with the other resources utilised in the proceedings.

Conclusion

49. In light of the reasons as set out above, I order that Grounds 1, 3, 4, 5 and 6 be struck out leaving only Ground 2 on the issue of delay to proceed. The hearing of Ground 2 should be set down on an expedited basis, if the Appellant decides to continue with it.

50. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, the parties should bear their own cost for this application.

MUSSENDEN J