In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2012: NO. 87

APEX CONSTRUCTION MANAGEMENT LTD.

1st Appellant

-and-

ANDREAS BATTISTON

2nd Appellant

-and-

KEVIN MASON

3rd Appellant

-v-

PERNELL GRANT

Respondent

RULING ON PRELIMINARY ISSUE
(in Court)

Date of hearing: March 13, 2015
Date of Ruling: April 6, 2015

Mr. Peter Sanderson, Wakefield Quin Limited, for the 2nd and 3rd Appellants
Mr. Allan Doughty, Isis Law Ltd., 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 Appellants 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 which, it was conceded, had been struck-off the register and dissolved. I dismissed 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. At the hearing of the preliminary issue, Mr. Doughty conceded that the appeal of the 3rd Appellant should be allowed and that only the appeal of the 2nd Appellant was still in issue. Mr. Sanderson invited the Court to merely decide at this stage whether the Board's findings of liability for breach of the Act were supportable as a question of law. It was ultimately agreed that if the Court found that the findings were legally unsupportable, the consequences flowing from such finding should be reserved to a subsequent substantive appeal hearing.

The Board's decision

5. It was common ground that the Respondent's 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*…"

6. The 2nd 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.*"

7. The preliminary issue essentially turned on the question of what acts or omissions needed to be established on the part of a senior employee who was not a director of a company to establish liability against the employee for discrimination under the Human Rights Act. Was mere knowledge on the part of the 2nd Appellant enough, as the finding in paragraph 30 of the Board's judgment implied?

The respective submissions

8. Mr. Sanderson's essentially based his attack on the sufficiency of the findings against the 2nd Appellant on the following arguments concisely set out in his Skeleton Argument:

> "*3.2 The HRA does not create strict liability of mere knowledge of discrimination of a fellow employee by an employer. It does not create a duty for employees to attempt to prevent an employer from discriminating against a fellow employee.*
>
> *3.3 If mere knowledge were required to create liability, then it would create liability for any person who happens to stumble across knowledge of another's unlawful conduct. Such a principle is repugnant to the common law.*"

9. He supported this thesis by reference to principles of tortious liability, contending that a breach of the Human Rights Act 1981 constituted a tort, relying on extracts from two judicial precedents. Firstly, in *Stovin-v-Wise and Norfolk County Council* [1996] AC 923 at 931, Lord Nicholls opined as follows:

> "*The classic example of the absence of a legal duty to take positive action is where a grown person stands by while a young child drowns in a shallow pool. Another instance is where a person watches a nearby pedestrian stroll into the path of an oncoming vehicle. In both instances the callous bystander can foresee serious injury if he does nothing. He does not control the source of the danger, but he has control of the means to avert a dreadful accident. The child or pedestrian is dependent on the bystander: the child is unable to save himself, and the pedestrian is unaware of his danger. The prospective injury is out of all proportion to the burden imposed by having to take preventive steps. All that would be called for is the simplest exertion or a warning shout.*
>
> *Despite this, the recognised legal position is that the bystander does not*

owe the drowning child or the heedless pedestrian a duty to take steps to save him. Something more is required than being a bystander. There must be some additional reason why it is fair and reasonable that one person should be regarded as his brother's keeper and have legal obligations in that regard. When this additional reason exists, there is said to be sufficient proximity. That is the customary label. In cases involving the use of land, proximity is found in the fact of occupation. The right to occupy can reasonably be regarded as carrying obligations as well as rights."

10. Reliance was also placed on Lord Hoffman's following *dictum* (at page 944). Counsel cited only on the last three sentences set out and underlined below, but these sentences can only be properly understood if looked at in the broader context of the passage in which those conclusory remarks appeared:

"*The judge made no express mention of the fact that the complaint against the Council was not about anything which it had done to make the highway dangerous but about its omission to make it safer. Omissions, like economic loss, are notoriously a category of conduct in which Lord Atkin's generalisation in Donoghue v. Stevenson [1932] A.C. 562 offers limited help. In the High Court of Australia in Hargrave v. Goldman (1963) 110 C.L.R. 40, 65–66 , Windeyer J. drew attention to the irony in Lord Atkin's allusion, in formulating his "neighbour" test, to the parable of the Good Samaritan ([1932] A.C. 562, 580):*

> *'The priest and the Levite, when they saw the wounded man by the road, passed by on the other side. He obviously was a person whom they had in contemplation and who was closely and directly affected by their action. Yet the common law does not require a man to act as the Samaritan did.'*

A similar point was made by Lord Diplock in Dorset Yacht Co. Ltd. v. Home Office [1970] A.C. 1004, 1060. There are sound reasons why omissions require different treatment from positive conduct. It is one thing for the law to say that a person who undertakes some activity shall take reasonable care not to cause damage to others. It is another thing for the law to require that a

person who is doing nothing in particular shall take steps to prevent another from suffering harm from the acts of third parties (like Mrs Wise) or natural causes. One can put the matter in political, moral or economic terms. In political terms it is less of an invasion of an individual's freedom for the law to require him to consider the safety of others in his actions than to impose upon him a duty to rescue or protect. A moral version of this point may be called the "why pick on me?" argument. A duty to prevent harm to others or to render assistance to a person in danger or distress may apply to a large and indeterminate class of people who happen to be able to do something. Why should one be held liable rather than another?" [emphasis added]

11. At first blush, the proposition that a mere bystander should not be liable for harm of which he is aware seems far removed from the proposition that a Manager who has been actively involved in implementing discriminatory practices should be not held liable for unlawful discrimination in breach of the Act. More pertinently, however, Mr. Sanderson relied upon the following extracts from the judgment of Aldous LJ in *Standard Chartered Bank-v-Pakistan National Shipping Corporation* [2000] 1 All ER(Comm) 1 as reflecting the test for an employee being liable for an employer's torts, the paragraphs upon which counsel being set out in full:

"15. Since Saloman v Saloman Co Ltd [1897] AC 22, companies have been recognised as separate legal entities to their shareholders, their directors and their employees. Leaving aside certain cases, not applicable in this case, where it has been held permissible to lift the corporate veil e.g. where the company is a mere facade, directors or employees acting as such will only be liable for tortious acts committed during the course of their employment in three circumstances.

16. First, if a director or an employee himself commits the tort he will be liable. An example is the lorry driver who is involved in an accident in the course of his employment. Although Mr Mehra was the person who was responsible for making the misrepresentations, he did not commit the deceit himself. For reasons I have already stated the representations were made by

Oakprime and not by him. Further, SCB relied upon them as representations by Oakprime and not as representations by Mr Mehra.

17. The second way that a director or an employee will become liable is a branch of the first. A director or an employee may, when carrying out his duties for the company, assume a personal liability. An example where personal liability was assumed was Fairline Shipping Corporation v Adamson [1975] QB 180. A different conclusion was reached in Trevor Ivory Ltd v Adamson [1997] 2 NZLR 517. What amounts to such an assumption will depend upon the facts of the particular case. Guidance as to how to decide whether such an assumption took place can be obtained from Williams v Natural Life Ltd [1998] 1 WLR 830. In that case, the second defendant, Mr Mistlin, opened a health food shop in Salisbury and in 1986 formed Natural Life Health Foods Ltd as a vehicle to franchise the concept of retail health food shops under the name 'Natural Life Health Foods'. The plaintiffs were interested and were encouraged by a brochure and a prospectus to enter into a franchise agreement. Their turnover was substantially less than predicted and they sued the company and Mr Mistlin for the negligent advice that had been given. The company was dissolved and thereafter the action proceeded against Mr Mistlin alone. Lord Steyn who gave the leading speech he said at page 834:

> *'It will be recalled that Waite LJ took the view that in the context of directors of companies the general principle must not "set at naught" the protection of limited liability. In Trevor Ivory v Anderson [1992] 2 NZLR 517, 524, Cooke P. expressed a very similar view. It is clear what they meant. What matters is not that the liability of the shareholders of a company is limited but that a company is a separate entity, distinct from its directors, servants or other agents. The trader who incorporates a company to which he transfers his business creates*

a legal person on whose behalf he may afterwards act as director. For present purposes, his position is the same as if he had sold his business to another individual and agreed to act on his behalf. Thus the issue in this case is not peculiar to companies. Whether the principle is a company or a natural person, someone acting on his behalf may incur personal liability in tort as well as imposing vicarious or attributed liability upon his principal. But in order to establish personal liability under the principle of Hedley Byrne which requires the existence of a special relationship between plaintiff and tortfeaser, it is not sufficient that there should have been a special relationship such as with the principal. There must have been an assumption of responsibility such as to create a special relationship with the director or employee himself.'

He went on at p.835:

'The touchstone of liability is not the state of mind of the defendant. An objective test means that the primary focus must be on things said or done by the defendant or on his behalf in dealings with the plaintiff. Obviously, the impact of what a defendant says or does must be judged in the light of the relevant contextual scene. Subject to this qualification the primary focus must be on exchanges (in which term I include statements and conduct) which cross the line between the defendant and the plaintiff. Sometimes such an issue arises in a simple bilateral relationship. In the present case a triangular position is under consideration: the prospective franchisees, the franchiser company, and the director. In such a case where the personal liability of the director is in question the internal arrangements between a director and his company cannot be the foundation of a director's personal liability in tort. The inquiry must be whether the director or anybody on his behalf, conveyed directly or indirectly to the prospective franchisees that the director assumed personal liability towards the prospective franchisees. An example of such a case being established is Fairline Shipping Corporation v Adamson [1975] QB 180. The plaintiffs sued the defendant, a director of a warehousing company, for the negligent storage of perishable goods. The contract was between the plaintiff and the company. But Kerr J held that the director was personally liable. That conclusion was possible because the director wrote to the customer, and rendered an invoice, creating the clear impression that he was personally answerable for the services. If he had chosen to write on company notepaper, and rendered an invoice on behalf of the company, the necessary factual foundation for finding an assumption of risk would have been absent. A case on the other side of the line is Trevor Ivory Ltd v Andersen [1992] 2 NZLR 517. This case concerned negligent advice given by a one-man company to a commercial fruit-grower. Despite proper application of the spray it killed the grower's fruit crop. The company was found liable in contract and tort. The question was whether the beneficial owner and director of the company was personally liable. The plaintiff had undoubtedly relied on the expertise of the director in

contracting with the company. The New Zealand Court of Appeal unanimously concluded that the defendant was not personally liable. McGechan J, who analysed the evidence in detail, said, at p. 532, that there was merely "routine involvement" by a director for and through his company. He said that there "was no singular feature which would justify belief that Mr Ivory was accepting a personal commitment, as opposed to the known company obligation." That was the basis of the decision of the Court of Appeal. In his 1997 Hamlyn Lecture on "Turning Points of the Common Law", Lord Cooke of Thorndon commented that if the plaintiff in Trevor Ivory v Anderson "had reasonably thought that it was dealing with an individual, the result might have been different": see "A Real Thing, Taking Salomon Further", p.18, note 50. Such a finding would have required evidence of statements or conduct crossing the line which conveyed to the plaintiff that the defendant was assuming personal liability.'...

20. The third ground of liability arises when the director does not carry out the tortious act himself nor does he assume liability for it, but he procures and induces another, the company, to commit the tort."

12. The cited passage is addressing not the issue of bystander liability, but the distinct and broader question of under what circumstances directors or employees of a company may incur personal liability for their acts or omissions while acting on behalf of a company. These principles are more relevant to the present case where issue is joined on where the boundaries between corporate and individual liability ought properly to be drawn. The quoted passages from the English Court of Appeal leading judgment in *Standard Chartered Bank-v-Pakistan National Shipping Corporation* [2000] 1 All ER(Comm) 1, admittedly reversed on appeal on another point, clearly supported the proposition that liability for unlawful discrimination, assuming the principles of tortious liability apply, required proof that the 2nd Appellant either:

    (a) himself committed the acts of discrimination complained of; or

    (b) having regard to an objective assessment of the relevant facts, assumed personal liability to the claimant (the Respondent to this appeal).

13. Finally, the 2nd Appellant's counsel supported his contention that liability for discrimination in contravention of the Act, even when invoking the statutory complaint mechanism, is tortious by reference to the following provisions of the Act:

"20A(1) *A claim by any person ("the claimant") that another person ("the respondent") has committed an act of discrimination against the claimant which is made unlawful by virtue of Part II may be made the subject of civil proceedings in like manner as any other claim in tort.*"

14. Mr. Doughty contested the notion that a claim for relief under the statutory procedure laid down by the Act should be regarded as governed by principles of tortious liability simply because an action in ordinary civil proceedings for breach of statutory duty would be, by virtue of section 20A(1), an action in tort. Instead, he argued, a claim for relief under the Act was, in effect, a *sui generis* claim based on statutory provisions which had, in all respects, to be given an ample and generous construction, consistent with the distinctive public policy imperatives underlying all human rights codes. The Respondent's counsel supported this by reference to Canadian Supreme Court authority considering the Ontario Human Rights Code, upon which this Court has previously held[1] our own Act is substantially based. *Robichaud-v-Canada (Treasury Board)* [1987] 2 S.C.R. 84 involved a complaint of sexual harassment against a supervisor and the complainant's employer, the Crown. The Crown sought to avoid liability relying on tortious principles of vicarious liability, an argument which was rejected. La Forest J held:

"*9. It is worth repeating that by its very words, the Act (s. 2) seeks 'to give effect' to the principle of equal opportunity for individuals by eradicating invidious discrimination. It is not primarily aimed at punishing those who discriminate. McIntyre J. puts the same thought in these words in O'Malley at p. 547:*

> *'The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant.'*

10. Since the Act is essentially concerned with the removal of discrimination, as opposed to punishing anti-social behaviour, it follows that the motives or intention of those who discriminate are not central to its concerns. Rather, the Act is directed to redressing socially undesirable conditions quite apart from the reasons for their existence…

The foregoing remarks were made in the context of a provincial human rights code, but they are equally applicable to the federal Act; see Bhinder v. Canadian National Railway Co., [1985] 2 S.C.R. 561, at p. 586, per McIntyre J. In the latter case, similar views to those of McIntyre J. in O'Malley were expressed, albeit in dissent, by Dickson C.J., at pp. 569 and 571. The same approach is again inherent in the Chief Justice's judgment in Canadian National Railway Co. (Action Travail des Femmes), supra…

[1] *Roberts & Hayward-v-Minister of Labour, Home Affairs & Public Safety* [2008] Bda LR 47; [2008] SC (Bda) 43 Civ (15 August 2008), per Ground CJ (at paragraphs 11- 12).

12. The last observation also goes some way towards disposing of the theory that the liability of an employer ought to be based on vicarious liability developed under the law of tort. On this issue, counsel for the Crown placed considerable reliance on the requirement in s. 7(b) that the act complained of must have been done in the course of employment. It is clear, however, that that limitation, as developed under the doctrine of vicarious liability in tort cannot meaningfully be applied to the present statutory scheme. For in torts what is aimed at are activities somehow done within the confines of the job a person is engaged to do, not something, like sexual harassment, that is not really referable to what he or she was employed to do…

13. Any doubt that might exist on the point is completely removed by the nature of the remedies provided to effect the principles and policies set forth in the Act. This is all the more significant because the Act, we saw, is not aimed at determining fault or punishing conduct. It is remedial. Its aim is to identify and eliminate discrimination. If this is to be done, then the remedies must be effective, consistent with the 'almost constitutional' nature of the rights protected."

Legal findings: is liability for discrimination under the Human Rights Act 1981 governed by principles applicable to liability in tort?

15. The superficial attractiveness of Mr. Sanderson's submission that it was undesirable to find that a different standard of liability applied to a discrimination complaint pursued under the Act to a claim in civil proceedings in the courts cannot be denied. However, it may be based on a false paradox. Without deciding this point, which was not fully canvassed in argument, the assumption that section 20A(1) of the Act is more than a procedural provision and applies the substantive law of tortious liability to civil proceedings for breaches of the Act may be wholly misconceived. Be that as it may, the *Robichaud* case in my judgment furnished powerful persuasive support for the proposition that the principles of liability for discrimination under the Act, in the context of a complaint prosecuted before a human rights tribunal (if not for all purposes), ought not to be confined to those principles applicable to purely common law tortious claims.

16. The similarity between the Bermudian Human Rights Act and the corresponding Ontario human rights regimes, and the resultant persuasive force of relevant Canadian authorities has been recognised by this Court on previous occasions, as Mr. Doughty rightly pointed out: *Roberts & Hayward-v-Minister of Labour, Home Affairs & Public Safety* [2008] Bda LR 47 (Ground CJ); *Smith-v- Minister of Culture and Social Rehabilitation* [2011] Bda LR 7[2]. I accordingly accept that that the reasoning of the Supreme Court of Canada in *Robichaud-v-Canada (Treasury Board)* [1987] 2 S.C.R. 84 should be regarded as evidencing the corresponding position under Bermudian law. Five points arise from this preliminary conclusion.

[2] [2011] SC (Bda) 8 Civ (14 February 2011).

17. Firstly, I accept the broader submission advanced by the Respondent's counsel, namely that the statutory regime applicable to human rights in Bermuda is a distinctive legislative framework for the protection of human rights, informed in part (as reflected by the preamble to the Act) by the European Convention on Human Rights and Fundamental Freedoms. This requires a distinctive interpretative approach to the legislative provisions. As La Forest J opined in *Robichaud*:

> "*8. The purpose of the Act is set forth in s. 2 as being to extend the laws of Canada to give effect to the principle that every individual should have an equal opportunity with other individuals to live his or her own life without being hindered by discriminatory practices based on certain prohibited grounds of discrimination, including discrimination on the ground of sex. As McIntyre J., speaking for this Court, recently explained in Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536, the Act must be so interpreted as to advance the broad policy considerations underlying it. That task should not be approached in a niggardly fashion but in a manner befitting the special nature of the legislation, which he described as 'not quite constitutional'; see also Insurance Corporation of British Columbia v. Heerspink, [1982] 2 S.C.R. 145, per Lamer J., at pp. 157-58. By this expression, it is not suggested, of course, that the Act is somehow entrenched but rather that it incorporates certain basic goals of our society. More recently still, Dickson C.J. in Canadian National Railway Co. v. Canada (Canadian Human Rights Commission) (the Action Travail des Femmes case), [1987] 1 S.C.R. 1114, emphasized that the rights enunciated in the Act must be given full recognition and effect consistent with the dictates of the Interpretation Act that statutes must be given such fair, large and liberal interpretation as will best ensure the attainment of their objects.*"

18. Secondly, and ancillary to the latter point, the statutory complaint mechanism is not intended to be wholly analogous to a claim for breach of statutory duty which, as section 20A(1) provides, may be pursued like any other civil proceedings in tort. This point may be illustrated by my own interlocutory finding (in a judgment not referred to in argument) that where a complaint is dismissed by the Human Rights Commission without being determined by a board of inquiry, a subsequent civil claim is not debarred: *Roberts and Hayward-v-Minister of Culture and Social Rehabilitation* [2004] Bda LR. I held in that case (which admittedly did not consider the effect of the dismissal of a complaint following a full hearing before a board of inquiry on the ability of the complainant to bring a subsequent tort claim):

> "*The Crown's analysis of the Act in this case involves construing section 20A(1)*[3] *as implicitly restricting the right of access to the Court by adding the following additional sentence: "But no such proceedings may be brought where a person's complaint has been dismissed by the*

[3] Section 20A provides: "*(1) A claim by any person ("the claimant") that another person ("the respondent") has committed an act of discrimination against the claimant which is made unlawful by virtue of Part II may be made the subject of civil proceedings in like manner as any other claim in tort"*

> *Commission under section 15(8)." Even if such plain words had been used, they would be arguably contrary to section 6(8) of the Constitution and invalid accordingly. But absent plain words, in my view section 20A should as far as possible be construed so as to conform to the Bermuda Constitution. And that results in construing section 15(8) as read with section 20A as not debarring the Plaintiffs from pursuing their claims in the present action, notwithstanding their prior dismissal by the Human Rights Commission.*"

19. Thirdly, it is necessary to acknowledge the distinction between the narrow issue which was explicitly decided in *Robichaud* from the specific issue the present preliminary issue requires to be determined. In *Robichaud*, what was in issue was not the test for liability of an employee alleged to have committed discriminatory acts at worst, or to have had knowledge of discriminatory acts by his employer at best. The Supreme Court of Canada was considering the entirely different issue of whether or not an employer could escape liability for discriminatory acts committed by an employee on the grounds that it was not vicariously liable. If the normal rules of vicarious liability applied to employers, they could rarely be held responsible for their employee's discriminatory acts save, perhaps, in circumstances where the relevant human actors were directors or other agents whose knowledge could be attributed to a corporate employer. The Crown, the employer in *Robichaud-v-Canada (Treasury Board)* [1987] 2 S.C.R. 84 would, perhaps, be even more immune from liability in most cases. The substance of the decision in *Robichaud* was that he application of the tortious rules relating to vicarious liability was fundamentally inconsistent with the statutory scheme because it would in a practical sense defeat the objects of the relevant statute.

20. Fourthly, that distinction notwithstanding, the reasoning in *Robichaud* nevertheless completely undermines any serious argument that the rules of tortious liability automatically or mandatorily apply to a human rights complaint prosecuted before a statutory board of inquiry. This is because tortious liability frequently has some regard to the state of mind of the tortfeasor, particularly in the context of determining whether or not a duty of care existed and/or was breached, even where specific intent is not an element of the tort. However, as La Forest J opined in *Robichaud*, in a passage upon which Mr. Doughty aptly relied, the statutory human rights context is quite different:

> "*10. Since the Act is essentially concerned with the removal of discrimination, as opposed to punishing anti-social behaviour, it follows that the motives or intention of those who discriminate are not central to its concerns. Rather, the Act is directed to redressing socially undesirable conditions quite apart from the reasons for their existence…*"

21. Fifthly, it follows that in determining what the requirements for liability under the Act are in the employment discrimination context, an analysis must be carried out of the specific statutory provisions which are engaged by the complaint and the factual matrix of the case as a whole, including:

(a) the nature of the discriminatory acts (or omissions) complained of;

(b) the identity of the respondent in question and their position in the relevant employment structure; and

(c) the basis on which the complaint is prosecuted and defended.

22. The crucial statutory words for present purposes are the following:

> "*6 (1) Subject to subsection (6) no person shall discriminate against any person in the ways set out in section 2(2) by-*
>
> ...
>
> *(c)refusing to train, promote or transfer an employee;*
>
> ...
>
> *(f)maintaining separate lines of progression or 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…*"

23. Section 6(1)(c) and (f) were relied upon by the Respondent as the ways in which he complained he was discriminated against. Construing the statute liberally with a view to giving effect to its goal of protecting human rights, it seems self-evident that:

(a) "*no person shall discriminate*" potentially includes not just the employer in a narrow legal sense, but includes any directors, managers, supervisors and/or general employees as well;

(b) a person would potentially be liable for discrimination if they either:

(i) committed the allegedly discriminatory acts,

(ii) procured other persons to commit the acts complained of, and

(iii) omitted to take remedial steps, in circumstances where the relevant person had knowledge of the discriminatory acts and possessed the authority to put a stop to them; and

(c) although there may be some overlap with the tortious liability test (e.g. examples (i) and (ii) in subparagraph (b) hereof), it is impossible to exclude the possibility of a more fluid and generous test for liability, depending on the applicable facts.

24. For the above reasons, I reject Mr. Sanderson's submission to the effect that the tortious rules of liability mandatorily apply to a complaint of unlawful discrimination

made under the Act. While some of those rules may well be entirely consistent with the statutory version of liability under the Act, it is the statutory provisions themselves which determine the rules of liability, not the common law tort rules.

Findings: did the Board err in law in finding the 2nd Appellant liable for discrimination based on knowledge alone?

25. The Respondent's case as complainant before the Board was clearly not based on the premise that the 2nd Appellant had committed discrimination by failing to prevent it occurring, despite having knowledge that it was occurring. At pages 460 and 611 of the Transcript, the following cross-examination and re-examination of the 2nd Appellant is recorded:

> "***Q.*** *Now, on the basis of what you said earlier as to your role as Construction Operations Manager, you agree that you were really the guy who was entirely in charge of the Apex operations between 2006 and 2010, right? Or really 2005 and 2010, correct?*
>
> ***A.*** *Well, I worked with the owner, he knew what was going on.*
>
> ***Q.*** *But you were the guy on the scene, correct?*
>
> ***A.*** *Right….*
>
> ***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…*[The acts of discrimination complained of were then put to the 2nd Appellant on the basis that he was actively involved in the impugned course of conduct]…
>
> [Re-examination]
>
> ***Q.*** *…tell me, within the context of your company organization, who is the individual, who was the individual, is the individual, responsible for hiring and firing.*
>
> ***A.*** *I am.*"

26. The three Appellants were represented before the Board by the same counsel and apparently defended the complaint on the grounds that no discrimination had occurred on mixed legal and factual grounds. No distinction seems to have been made, on either side, between the respective roles played by the company and the two employee respondents to the complaint by either complainant or respondents. The Board would have been assisted by being reminded by counsel of the need to consider the liability of each respondent separately, despite the fact that they had not raised distinctive defences. On the one hand, there was clearly evidence that the 2nd Appellant was actively involved in any discriminatory acts which were found to have been

committed by the 1st Appellant. On the other hand, it is unclear what evidence of there was of the 3rd Appellant's participation. It does not appear that the Board received the requisite assistance. Be that as it may, and 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.

27. It remains to consider whether this conclusion justifies resolving the preliminary issue in the 2nd Appellant's favour.

Conclusion

28. When the preliminary issue was ordered to be determined before the appeal as a whole on January 7, 2015, it appeared possible that the determination that the Board erred in law by concluding that the individual Appellants were liable based on mere knowledge of discriminatory acts committed by their corporate employer might be sufficient to dispose of their appeals as a whole. The transcript of the proceedings before the Board was only filed two months' later. While this strengthened the case of the 3rd Respondent on the merits, it undermined the case of the 2nd Respondent. Order 55 of this Court's Rules governs "*every appeal which by or under any enactment lies to the Supreme Court from the decision from any court, tribunal or person.*" Order 55 rule 7 provides:

> "*(7) The Court shall not be bound to allow the appeal on the ground merely of misdirection, or of the improper admission or rejection of evidence, unless in the opinion of the Court substantial wrong or miscarriage has been thereby occasioned.*"

29. Without deciding this point at this stage, it is at least arguable that Order 55 applies to appeals under the Act, because section 21(5) contemplates that any appeal rules may be made under the same rule-making power pursuant to which Order 55 is made. Even if Order 55 does not apply, it is in any event clear from section 21 of the Act itself that this Court's appellate jurisdiction in respect of board of inquiry decisions is quite broad. Section 21(3) 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.*"

30. In these circumstances, 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.

Dated this 6th day of April, 2015 _____

IAN R.C. KAWALEY CJ