[2015] SC (Bda) 92 Civ (13 November 2015)

In The Supreme Court of Bermuda

CIVIL JURISDICTION

2014 No. 206

BETWEEN:

Nneka Powell

Appellant

-v-

Penny-Lynn Paynter

Respondent

Date of Hearing: 13 August 2015

Date Decision Circulated: 13 November 2015

Apex Law Group Ltd – Mr Bruce Swan for the Appellant

Wakefield Quin Ltd – Mr Peter Sanderson for the Respondent

BeesMont Law Ltd – Mr Allan Doughty for the Executive Officer to the Human Rights Commission as Intervener

RULING

The Parties

1. The parties in this matter are the Appellant (Nneka Powell) and the Respondent (Penny-Lynn Paynter).

2. The Appellant and Respondent were involved in a tribunal hearing conducted by the Human Rights Commission. The Appellant's application is with regard to the outcome of that tribunal hearing. Accordingly, Mr Allan Doughty is acting as Intervener representing the Executive Officer to the Human Rights Commission.

The Application

3. The application before the Court is a notice of motion filed by the Appellant and referred to in Counsel for the Appellant's 8 July 2015 letter to the Registrar.

4. The Appellant seeks 'leave to appeal out of time, and to have the appeal [heard] and determined before Justice Wade-Miller, and [that] time for service be abridged'.

5. The submissions cite the Rules of The Supreme Court 1985 ('the Rules' or 'RSC').

Background

6. By notice of appeal dated 27 May 2014, the Appellant filed an appeal against the 17 April 2014 decision of the Bermuda Human Rights Tribunal (the Tribunal).

7. On 2 October 2014 the matter came before Justice Norma Wade-Miller in chambers. The Appellant (Ms Powell) and her counsel were present but the matter was adjourned after it was discovered that neither the Respondent (Mrs Paynter) nor the Tribunal had been served.

8. On 28 April 2015 the matter was scheduled to be heard in open court on 18 May 2015.

9. By summons and affidavit dated 12 May 2015, the Executive Officer to the Human Rights Commission applied to be granted Intervener status in the appeal hearing.

10. On 18 May 2015 the matter was heard. By consent Mr Doughty was granted Intervener status pursuant to the Human Rights Act 1981 section 2(2).

11. At the 18 May 2015 hearing, the Respondent informed the Court that her counsel had been disbarred. The Respondent was granted a short adjournment to retain new counsel.

    On 1 June 2015, Mr Sanderson filed a notice of appointment to act for the Respondent.

12. In an 8 July 2015 letter to the Registrar, Mr Swan for the Appellant wrote *inter alia*:

> *... we are now seeking to regularize the proceedings in line with Order 55 of the Supreme Court Rules. We are hereby attaching our notice of motion in this matter to be dated for a return date. We have not however filed an affidavit in support as we believe in this matter the circumstances surrounding the appeal are evident in the proceedings thus far.*

13. On 13 August 2015, the Court heard this matter. During the hearing, Counsel for the Appellant requested that as a point of administration 'We Care Home Services' be struck off as the First Respondent as it is an unincorporated company and a trading name of Mrs Paynter (Mrs Paynter was the Second Respondent in the Tribunal hearing). The Court agreed to this request.

Appellant's submission

14. Mr Swan, Counsel for the Appellant, gave an oral submission at the hearing.

15. Mr Swan states that he did not have a full address for the Respondent – only a post office box address. He attempted to get the Respondent's address via her 'McKenzie friend' (Mr Phillips); when that failed he contacted the Tribunal administrator on 9 June 2014. The Tribunal administrator sent the Respondent's full address on 10 June 2014.

    He asserts:

> *Upon being able to get the address we then sought about serving the documents onto Mrs Paynter and once that process was completed we contacted the Supreme Court clerks to let them know that we [had] sent documentation to Mrs Paynter, and sought about trying to have an appeal date set.*

16. Mr Swan argues that they provided documentation to the Tribunal 'at the earliest date' (4 June 2014). On 23 July, the courts sent a letter to the parties 'asking for mutually agreed dates for August 2014'.

Respondent's submission

17. Mr Sanderson, Counsel for the Respondent, opposes the Appellant's application for leave to appeal out of time.

18. Mr Sanderson cites two cases to support his stance: *Harold Joseph Darrell v Chief Executive Officers, Board of Directors, Bank of Bermuda* [2008] SC (Bda) 50 Civ, and *Phillips v Derbyshire County Council* [1996] EWHC Admin 97. *Darrell* involves an application for leave to appeal out of time. In that case the court declined to extend the time limit; the time limit was enforced as no acceptable reason for the delay was put before the Court. *Phillips* refers to the need for an acceptable explanation for delay, and for there to be material before the court on which it can exercise its discretion.

19. Mr Sanderson refers to the timeline of the appeal. He asserts:

> *There was a notice of appeal filed on 28 May 2014. Order 55 [of the Supreme Court Rules] states that a notice of motion be filed within 28 days. … it's not sufficient simply to file the documents in the courts, you need to serve the opposing side and have the matter entered for hearing within 28 days. In this case nothing was done within the 28 days. A defective notice was filed a few days after the 28 days. The matter was not served and entered for hearing dates until … July 2014.*

20. Mr Sanderson states that on 11 June 2015 he sent Counsel for the Appellant an email highlighting specific issues with the defective notice and the delay. He suggested that Counsel for the Appellant file a summons 'supported by an affidavit and the reasons for the delay seeking leave to appeal out of time'. However, Counsel for the Appellant filed a notice of motion without a supporting affidavit explaining the delay. Instead, the reasons for the delay have been given orally to the Court.

    Mr Sanderson maintains:

> *[Counsel for the Appellant's] explanation should have gone in by affidavit so that it's clear on record before the Court. … there was no explanation put in with the notice. He has given an explanation [but] I submit that it's not a satisfactory one. This basically amounts to dereliction of duty …*

21. Mr Sanderson then turns to the explanation given by Mr Swan for the delay, namely that they did not have the Respondent's address:

> *… the Human Rights Tribunal was aware of the details of the parties, Mr Swan says he didn't know Mrs Paynter's address [but] there is no affidavit supporting that, he is simply saying it today. That is something that could have been obtained from the Tribunal on day one. As soon as the Judgment was received if he wanted to make an appeal they could have asked the Tribunal for Mrs Paynter's address.*

22. Mr Sanderson maintains that there were other ways Mr Swan could have acquired the Respondent's address. He further asserts:

> *[Counsel for the Appellant] didn't even attempt to contact the Tribunal of record for the address of the Respondent until after the 28 days had lapsed. He didn't do it quick enough, that's a dereliction of duty.*
>
> *He got 28 days to file [his] notice, serve it and ask for a date for hearing – that time had gone and he hadn't even filed a notice yet. He filed [a] notice and then he started trying to find out where he [could] serve the Respondent.*
>
> *All things done too late, respondent(s) to these matters are entitled to fairness as well and [should] not have to be put to additional legal expenses and costs because an appellant acted in an untimely manner …*

23. Mr Sanderson maintains that the Appellant was the successful party in the Tribunal's ruling. He argues that her appeal is about trying to get more money from the Respondent:

> *There is no acceptable explanation for the delay, but if you find there has been this is not the type of case which really justifies extension of time because of a matter of compelling public importance … It's simply an argument where someone wants a bit more money from someone who has very little money to give.*
>
> *As to the merit of the appeal itself … what the appellant is attempting to get is damages or compensation that she could have attempted to gain via Employment Act proceedings. If she had … a disciplinary case of a claim for unfair dismissal … she should have brought it in the right place – that's the Employment Tribunal, it is a completely different body than the Human Rights Tribunal which deals with damages resulting from discrimination.*
>
> *… The Court of Appeal [held] in the case of Fort Knox, that unfair dismissal claims and Employment Act claims are confined at tribunal, you … can't bring them in Supreme Court cases …*

24. Mr Sanderson concludes:

> *Firstly, the delay is due to the fault of the attorney …*
>
> *Secondly, in terms of [the Court's] discretion … the amount in dispute does not justify [an] extension of time. The appeal is misconceived … [as] they are trying to claim employment damages which they failed to bring in time for [the] Tribunal.*
>
> *Finally, the Respondent is an old-age pensioner who is not really in a position to pay … the Appellant won her case in Tribunal she got vindication… she wants damages.*
>
> *… I know Mr Doughty wants a judgment which spells out the law for other people so that there is a clear law going forward. Why should Mrs Paynter, an*

old-age pensioner, be the one who has to bear the costs of [this]? It's not justified …

Response from the Appellant

25. Mr Swan accepts that his client won her tribunal case but argues:

> *… the judgment … is not satisfactory in line with the actual recommendations that were made, and the orders that were taken by the Human Rights Tribunal. … the Human Rights Tribunal under-compensated Ms Powell for her treatment.*

26. Mr Swan maintains that until Mr Sanderson took over as the Respondent's counsel:

> *we never had much assistance from Mrs Paynter as far as who she would be seeking counsel from, if Mr Braxton Phillips was still involved in the matter, whether or not she was taking issue with what was pleaded. … [Mrs Paynter] did not, after the fact assist very much in helping the matter move forward.*

27. Mr Swan argues that the Respondent is being portrayed as an elderly person, but she is also 'a prudent business woman who is running a very successful seniors care business …'.

    He states that the Appellant 'is still awaiting any sort of formation of a payment or any sort of payment agreement'.

Response from the Intervener

28. With regard to the time limit for making an appeal, Mr Doughty for the Human Rights Commission states that the Court can use its discretion to take account of RSC Order 3 rule 5 which gives the Court the authority to extend the time period for making an appeal against a decision.

29. Mr Doughty also indicates that the *Phillips* case cited by Mr Sanderson was decided in 1996 and therefore pre-dated the UK's Human Rights Act 1998. He further suggests that *Phillips* [supra] is not relevant to the application before the Court as it was an appeal 'within the education system … there is nothing to suggest … that this was an anti-discrimination claim which I would suggest is a different animal'.

30. Mr Doughty acknowledges that – 'if this was any proceedings other than a human rights matter' – then under ordinary circumstances he would agree with the points raised by Counsel for the Respondent.

    He continues:

> *… however think that if there have been any infractions on the part of appellant counsel, that can be dealt with appropriately with costs…*

Intervener's concerns

31. In his written submission on behalf of the Executive Officer for the Human Rights Commission, Mr Doughty states that the Executive Officer was concerned by 'points of law' arising from the Tribunal's ruling.

    He continues:

> *The Executive Officer is furthermore deeply troubled by the point of Appeal taken by the Appellant to this matter.*
>
> *It is the submission of the Executive Officer that the [Tribunal] at paragraph 41 of its Ruling, erred by providing provisions of the Employment Act, 2000, in calculating the damages of the Complainant. The Executive Officer instead submits that as a matter of Human Rights Jurisprudence, the correct means of assessing pecuniary damages in a Human Rights Complaint is by compensating the victim of the discrimination for his or her actual damage minus any measure of loss that the victim would not have sustained had the victim reasonably mitigated his or her damages.*
>
> *The Executive Officer is also concerned that the Complainant in her Notice of Appeal is claiming that the [Tribunal], upon finding that she was the subject of an Unfair Dismissal, erred by failing to award damages for Unfair Dismissal pursuant to Section 40(5)(b) of the Employment Act, 2000. It is the submission of the Executive Officer that this particular ground of Appeal is inconsistent with the existing jurisprudence concerning compensation that should appropriately be awarded to a victim of unlawful discrimination where [a tribunal] finds that a Complainant's rights, as guaranteed by the HRA have been breached.*
>
> *The Executive Officer is further troubled by the absence of an award for the Complainant's Injury to Feelings which she submits fell firmly within the powers of the [Tribunal] pursuant to Section 20(1) of the HRA.*
>
> *Finally the Executive Officer submits that the [Tribunal] erred in awarding costs to the Plaintiff to "be taxed if not agreed", on the basis of the powers of the HRT that are afforded by Section 20(1)(c) of the HRA.*

32. Mr Doughty asserts:

> *... there are two issues ... first with the Tribunal and secondly with the appeal that is being put forward, and what we are asking this court to do is to give a definitive statement to stop this sort of thing.*

The Court

Intervener's concerns

33. Mr Doughty as Intervener seeks a substantive hearing on the issues outlined in his written submission. The Court notes the Intervener's concerns, however the application before the Court is not directly concerned with the workings of the Tribunal and/or the details of their ruling. The current application is concerned with leave for the Appellant to apply out of time to appeal the Tribunal's 17 April 2014 ruling. In these circumstances, it is outside the remit of the Court to address the Intervener's concerns at this time.

Time limit for an appeal: the Rules of the Supreme Court

34. Under the Rules, the Court has the authority to exercise its discretion to grant leave to appeal out of time.

35. With regard to serving a notice of motion to appeal, RSC Ord 55 4(2) stipulates:

> *(2) The notice must be served, and the appeal entered, within twenty-eight days after the date of the judgment, order, determination or other decision against which the appeal is brought.*

36. At its discretion, a court may also amend the time limit for an appeal, in accordance with RSC Ord 3 rule 5:

> *5 (1) The Court may on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings.*
>
> *(2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.*
>
> *(3) The period within which a person is required by these rules, or by any order or direction, to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose.*

Evidence

37. In the Court's judgment, Counsel for the Appellant did not properly and adequately explain the reasons for the delay in seeking an appeal against the Tribunal's ruling. He failed to file an affidavit explaining the reasons for the delay despite the 11 June 2015 email from Counsel for the Respondent stating that he should do so.

38. The lack of evidence from the Appellant constitutes a fundamental irreversible flaw. In order for a court to consider exercising its discretion it must have material – evidence that is either oral or by affidavit – to consider.

39. Evidence refers to material information that the deponent can provide at first-hand. An affidavit contributes, and should be confined to, evidence in a written form. A respondent is then given an opportunity to challenge statements and allegations in the affidavit.

40. Submissions from counsel do not count as evidence. In *Re A and B* (Prohibited Steps Order at Dispute Resolution Appointment) [2015] EWFC B16 at paragraph 26, His Honour Judge Wildblood QC held:

> *26. If every issue had to be resolved on full oral evidence, with cross-examination, the court process would become very slow and the lists overburdened. What is more, the interests of fairness would not be furthered since often discussion can cut through a lot of wasteful verbiage. Of course, submissions are not evidence (and surely one does not need authority for that but if so – S v Merton LBC [1994] 1 FCR 186) but the difference between submissions and oral evidence where one is dealing with litigants in person may be more fanciful than real.*

41. In effect the Court has no material before it upon which it could consider granting an extension of the appeal time limit. Counsel for the Appellant filed a notice of motion, but failed to file a supporting affidavit.

Conclusion

42. For the above reasons the Court is unable to exercise its discretion to allow the Appellant to appeal out of time in this case. In these circumstances, the Appellant's application is denied.

43. Costs of this application shall be the Respondent's.

Dated ___ day of November 2015

Justice Norma Wade-Miller
Puisne Judge