In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2016: 26
2017 :99

FANAYE BROADBELT

Appellant

-v-

(1) BERMUDA ELECTRIC LIGHT COMPANY LIMITED
(2) DENTON WILLIAMS
(3) JOCENE WADE-HARMON

Respondents

REASONS FOR DECISION

(in Court)[1]

Appeal against dismissal of unfair dismissal claim by Employment Tribunal-jurisdiction of Employment Tribunal to adjudicate discrimination complaints-Employment Act 2000 section 28(1)(a)- appeal against summary dismissal of sex discrimination complaint by Human Rights Tribunal on res judicata grounds -Human Rights Act 1981section 20(6)-whether underlying facts supported application of the doctrine of res judicata

Date of hearing: September 12, 2017
Date of Reasons: September 20, 2017

Mr Eugene Johnston, J2 Chambers, for the Appellant
Mr Craig Rothwell, Cox Hallett Wilkinson Limited, for the Respondents

[1] The present judgment was circulated to the parties without a formal hearing in order to save costs.

Introductory

1. The Appellant is a former employee of the 1st Respondent. The 2nd and 3rd Respondents were at all material times employed by the 1st Respondent in a managerial capacity. She appeals against:

    (1) the decision of the Employment Tribunal dismissing her unfair dismissal complaint against the 1st Respondent on March 30, 2016; and

    (2) the February 17, 2017decision of the Human Rights Tribunal summarily dismissing her complaint against the 1st Respondent (initially brought against all three Respondents) that the same employment termination decision was discriminatory on gender grounds.

2. The two appeals were heard together. At the beginning of the hearing I summarily dismissed the Appellant's application for an adjournment. After hearing brief argument from counsel, it was clear that the Employment Tribunal had not determined the Appellant's discrimination complaint and that Human Rights Tribunal had wrongly dismissed the Appellant's complaint against the 1st Respondent on the unsupportable basis that Employment Tribunal had considered and decided the discrimination issue.

3. On September 12, 2017, I dismissed the Employment Tribunal appeal and allowed the Human Rights Tribunal appeal, making no order as to costs. It made sense to allow the Appellant to pursue her discrimination complaint against the 1st Respondent in the proceeding which was still pending before the Human Rights Tribunal against the 2nd and 3rd Respondents. No grounds for setting aside the Decision of the Employment Tribunal other than for failing to consider the discrimination complaint were made out.

4. I now give reasons for the decisions on the merits of the two appeals.

The Employment Tribunal Appeal

<u>The scope of the Employment Tribunal Decision</u>

5. The Employment Tribunal (Mr. Gary L. Phillips, Chair) considered whether the dismissal was fair within the narrow confines of considering whether the employer had grounds for deciding that a summary dismissal was appropriate based on the Appellant's serious misconduct. The misconduct in question involved failing to properly account for and/or misapplying monies paid to the employee by the employer for educational purposes.

6. Mr Johnston substantiated this point very shortly by reference to the first page of the Decision. The "Matter in Dispute" was defined by reference to various sections of the Employment Act (sections 8, 18, 23, 25): section 28 was not mentioned. Had the Tribunal considered the discrimination argument advanced by the Appellant (who at that stage was representing herself), not only should that complaint have been mentioned in the body of the Decision, the sections listed as relevant to the dispute would have included the following provision:

> "*28 (1) The following do not constitute valid reasons for dismissal or the imposition of disciplinary action—*
>
> (a) *an employee's race, sex, religion, colour, ethnic origin, national extraction, social origin, political opinion, disability or marital status…*"

The merits of the appeal against the Employment Tribunal Decision

7. Mr Rothwell correctly submitted that it was not enough for the Appellant to establish an abstract error of law. It was also necessary to establish that a "*substantial wrong or miscarriage*" had occurred: *Elbow Beach Hotel Bermuda-v- Heidi Lynam* [2016] SC (Bda) 97 App (at paragraph 3). No substantial wrong had occurred, he further contended.

8. The main factual issue in my judgment was a straightforward one and the Tribunal reviewed oral evidence from both sides and considered documentary evidence. It was clearly open to the Tribunal to find that the employer had proved serious misconduct directly related to the employment relationship. I was satisfied that the Tribunal applied the correct legal test, had sufficient evidence to support its crucial findings, gave sufficient reasons for its decision and correctly held that the employer was entitled to deduct monies owing from the Appellant to the 1st Respondent from her final wage payment. Nor were the bias complaints shown to be sufficiently substantial to justify setting aside an otherwise valid decision.

9. It is clear from the record that the Appellant did complain that the decision to dismiss her was unfair because it was motivated by gender discrimination. The Tribunal either wrongly decided that it had no jurisdiction to entertain this complaint or erred in law failing to consider the complaint.

10. As Mr Johnston sensibly conceded that it made more sense to allow the Human Rights Tribunal appeal even though the Appellant succeeded in making out a ground for setting aside the Employment Tribunal's decision (namely the failure to decide

the discrimination complaint), I declined in the exercise of my discretion to do so on the grounds that in light of my decision on the Human Rights Tribunal appeal (the reasons for which are set out below), no substantial miscarriage of justice had occurred.

The Human Rights Tribunal appeal

The Human Rights Tribunal Decision

11. The Human Rights Tribunal (Ms Carla George Chair), having heard arguments by counsel on the Respondent's preliminary application, dismissed the application under section 20(6) of the Human Rights Act 1981 on *res judicata* grounds. Argument appears to have focussed on whether the Tribunal had the power to dismiss a complaint on *res judicata* grounds, with only limited attention seemingly being given to whether, on the facts of the present case, the doctrine properly applied to prevent the Appellant from raising the discrimination complaint (which the Employment Tribunal had not expressly considered) before the Human Rights Tribunal.

12. The Tribunal correctly found that the Appellant's complaint was one of issue estoppel, aptly citing the following *dicta* of Lord Keith in *Arnold-v-National Westminster Bank plc* [1991] 2 AC 93 at 104-105:

> "*Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be re-opened…*
>
> *Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue…*"

13. The Tribunal also noted that this statement of the law, found in a unanimous decision of the House of Lords, was recently approved by the UK Supreme Court in *Virgin Atlantic Airways Ltd-v- Zodiac Seats UK Ltd.* [2014] AC 160 (at paragraph 20, per Lord Sumption). The nuggets of wisdom which the Tribunal did not manage to

extract from these two eminent English authorities was that issue estoppel required the establishment of one of two essential elements:

- a common issue which was both raised subsequent proceedings and had been actually decided in the earlier proceedings; or

- a common issue which was raised in subsequent proceedings and which was not (but ought to have been) raised in the earlier proceedings.

14. The crucial finding made by the Tribunal was as follows:

> "*28. The Tribunal agrees with Mr. Johnston that the Employment Tribunal's ruling does not make any mention of section 28 of the 2000 Act or the act of gender discrimination, however with the evidence presented it would not be prudent for this Tribunal to conclude that the Employment Tribunal did not consider all the issues put before them , including the extensive allegations of gender discrimination, when coming to their decision that Ms Broadbelt was fairly dismissed due to serious misconduct.*"

15. In reaching this conclusion, the Tribunal purportedly applied the reasoning of the Canadian Human Rights Tribunal in *Toth-v- Kitchener Aero Avionics* 2005 CRT 19, where a human rights complaint was dismissed on *res judicata* grounds because relief had been obtained in respect of the same complaint under the Canada Labour Code. The *Toth* case was crucially different from the present case in two respects:

- the complainant Toth won her Labour complaint and was seeking additional relief from the Human Rights Tribunal;

- the earlier decision of the Labour adjudicator was based on the same central factual allegation (the complainant's pregnancy) which also grounded the subsequent human rights complaint: the earlier tribunal not only considered but also actually decided this allegation.

16. The extracts from the Canadian Human Rights Tribunal decision recited in the Tribunal's decision included the following passages from the *Toth* decision upon which the Respondents' counsel relied before the Bermudian Tribunal:

> "*[21] I cannot see any way around it. The legal question before the Tribunal is whether Ms. Toth was discriminated against. The legal question before the adjudicator was whether she was unjustly dismissed. These two questions*

collapse into each other. The adjudicator's decision was premised on the finding that Mr. Aylward's attitude to the pregnancy entered into his decision to let her go. I think this constitutes a finding of discrimination.

[22] If Ms. Toth was unjustly dismissed, it was because she was discriminated against. It follows that the same question was at least implicitly before the adjudicator. A ruling in favour of the Respondent on the human rights complaint would contradict the ruling of the adjudicator. It would not be possible to find that the Complainant's position was properly terminated without offending the privative clause in section 243 of the Canada Labour Code.

[23] The situation might be different if there was a distinct allegation of harassment, which could be severed from the termination. The underlying factual issues in the two hearings are the same, however. The adjudicator had to consider the Respondent's entire course of conduct, in reaching his conclusions. Any other allegations are an integral part of the course of conduct that culminated in the termination. It is all part of the same fabric."

The merits of the appeal against the Human Rights Tribunal decision

17. The appeal had two main limbs to it: (1) whether or not the Tribunal had jurisdiction to dismiss the complaint on *res judicata* grounds, and (2) whether or not the Tribunal was correct to find that the complaint was liable to be dismissed on *res judicata* grounds, assuming that it had the jurisdiction to dismiss on these grounds.

18. Mr Johnston was correct to contend that as a creature of statute the Tribunal (in contradistinction to a superior court of record) had no inherent jurisdiction to dismiss a complaint on abuse of process grounds. There is perhaps some room for doubt as to whether section 20(6), which the Tribunal correctly found was drafted in broad terms, includes (by necessary implication) the power to dismiss a complaint on abuse of process grounds alone. By 'abuse of process alone', I mean abuse of the processes of the Tribunal itself. The relevant statutory power is defined as follows:

"*(6) The Tribunal may dismiss a complaint at any stage of the proceedings.*"

19. However, there is far less room for doubt that section 20(6) confers a power to dismiss a complaint otherwise than on its merits on other legal grounds because the power may be deployed "*at any stage*". It is almost impossible to identify any convincing reason for rejecting the assumption, which underpinned the Respondents' preliminary application before the Tribunal, that a complaint may be dismissed before it is heard because, as a matter of the general law of Bermuda, the Complainant is

barred from bringing the claim. Putting aside the doctrine of *res judicata*, the statutory power of dismissal would very arguably apply in circumstances where:

- a complainant withdrew a complaint on an explicitly 'with prejudice' basis;
- a complaint could no longer be pursued because the respondent, a company, had ceased to exist; and/or
- the complainant had entered into a binding compromise of her human rights complaint.

20. I reached no concluded view on the jurisdictional aspect of the appeal in deciding that it should be allowed, and made no formal decision on the jurisdiction issue. This was entirely for case management reasons. Mr Johnston was unwilling to concede the jurisdictional point; it would have been wasteful of time and costs to hear full argument on the question when it was possible to dispose of the appeal expeditiously on more straightforward grounds.

21. The operative basis for my decision to allow the appeal was that, assuming jurisdiction to dismiss was vested in the Tribunal, there was in any event no legally sufficient basis for dismissing the human rights complaint on *res judicata* grounds. This was simply because the facts of the present case, properly analysed, did not support a finding of *res judicata* grounded in issue estoppel because the discrimination complaint was neither:

- an issue which was raised and decided before the Employment Tribunal, nor
- an issue which could and should have been raised by the Appellant but was not raised before the Employment Tribunal.

22. Under section 21(4) of the 1981 Act, appeals lie to this Court from the Tribunal on "*questions of law or fact or both*". There are ultimately three overarching reasons why the findings by the Human Rights Tribunal that the Employment Tribunal implicitly considered and rejected the gender discrimination complaint are neither factually nor legally supportable:

(1) a straightforward reading of the decision is wholly inconsistent with the conclusion that the Employment Tribunal explicitly or implicitly decided the gender discrimination complaint for the following reasons:

(a) the relevant statutory provision (section 28 of the Employment Act 2000) is *not* listed amongst the other sections identified in the decision as relevant to the "*Matter in Dispute*",

(b) the decision opens by defining the complaint without reference to the gender discrimination complaint: "*It is alleged by the Employee that she was unfairly dismissed for serious misconduct under Section 25 of the Employment Act 2000*".

(c) the employee's case is described in great detail essentially (i) refuting the employer's "*insubordination, dishonesty and deception*" grounds for termination, and (ii) advancing an unauthorised deduction from pay complaint, without mentioning the gender discrimination complaint,

(d) the Employment Tribunal explicitly found that the employer was entitled to dismiss for serious misconduct and that no improper deduction was made from the employee's pay, deciding the issues it identified as requiring adjudication,

(e) not a single reference to the term 'gender discrimination' appears in the six page long decision,

(f) the Appellant instructed her counsel, and was willing if necessary to support on oath if given leave to supplement the record of the present appeal, that at the Employment Tribunal hearing when she sought to raise the discrimination complaint that the Chair indicated that this complaint was not for them to decide,

(g) the original unfair dismissal complaint made no explicit complaint of discrimination but did allege a breach of the Human Rights Act which the Employment Tribunal would not have been competent to adjudicate,

(h) the Appellant's Witness Statement made four passing references to discriminatory work practices in which males were treated preferentially, but made no explicit complaint that the reason for her termination was discriminatory treatment in contravention of section 28 of the Employment Act 2000 or otherwise,

(i) the 1st Respondent's written submissions prepared by counsel did not deal with the topic of gender discrimination;

(j) the Appellant, who was unrepresented, only clearly raised the issue of discrimination in her 'Skeleton Argument' dated the day before the hearing. Paragraph 1 cited the Human Rights Act 1981, while paragraph 12(c) (explicitly) and paragraph 13 (h) and (i) (implicitly) alleged breaches of sections 2 and 6 of the Human Rights Act 1981. Paragraph 12(a) complained of unfair dismissal contrary to section 28 of the Employment Act 2000, while paragraphs 50-54 addressed the question "*Was the reason for dismissal gender discrimination?*";

(2) having regard to the way in which the Appellant pleaded her initial Employment Act complaint and the 1st Respondent responded to it, it was legally possible for the Employment Tribunal to adjudicate the unfair dismissal complaint without considering the discrimination issue. This is because the Appellant's complaint was not (in contrast to the *Toth* case) solely based on facts alleging discriminatory treatment. Her primary case was that the employer was wrong to find that she was guilty of serious misconduct, discrimination apart; and

(3) the only proper conclusion to draw from the record of the Employment Tribunal proceedings was that although the Appellant at a late stage raised the gender discrimination issue which could have been adjudicated under section 28 of the Employment Act as part of those proceedings, the Employment Tribunal made a conscious decision not to adjudicate that complaint. It was fairly open to the Employment Tribunal to decide that it was not best placed to fairly adjudicate the discrimination complaint because:

(a) the 1st Respondent and the Tribunal had insufficient notice of the section 28 point, which had neither been addressed through pleadings nor in written evidence in advance of the hearing; and

(b) it was legally and factually difficult to sever the Human Rights Act discrimination limb of the Appellant's case (which on one view was the dominant limb of her discrimination complaint) from the Employment Act discrimination limb of her case.

23. Accordingly, the doctrine of *res judicata* based on issue estoppel was not engaged on the facts of the present case. This was not a case where the initial proceedings had

considered and rejected the discrimination issue on its merits. Nor was it a case where the Appellant ought to have raised the discrimination issue in the unfair dismissal proceedings, but had failed to do so. Statutory tribunals whose mandate is to promote and protect human rights through 'citizen-friendly' proceedings should in my judgment only dismiss proceedings at the preliminary stage, whether on *res judicata* or other grounds, in the clearest of cases. In the present case, I would hazard a guess, the Human Rights Tribunal might well have arrived at a different result if counsel's arguments had focussed more sharply on the particularities of the case presented before the Employment Tribunal and the true scope of its decision.

24. The mischief which the doctrine of *res judicata* seeks to mitigate is duplicative proceedings which are inherently abusive and, as a result, inherently unjust. No such injustice has occurred here. As Lord Sumption opined in *Virgin Atlantic Airways Ltd-v- Zodiac Seats UK Ltd.* [2014] AC 160 (at paragraph 25):

> "…*Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive...*"

Conclusion

25. For the above reasons on September 12, 2017, I :

(a) dismissed the Appellant's appeal against the decision of the Employment Tribunal on March 30, 2016 to dismiss her unfair dismissal complaint against the 1st Respondent; and

(b) allowed the Appellant's appeal against the decision of the Human Rights Tribunal to summarily dismiss her gender discrimination complaint on the grounds that the underlying issues had already been determined against her by the Employment Tribunal.

Dated this 20th day of September, 2017 _____

IAN RC KAWALEY CJ