In The Supreme Court of Bermuda

APPELATE JURISDICTION

2018 No: 54

2019 No: 01

BETWEEN:

ISLAND CONSTRUCTION LTD

First Appellant

ZANE DESILVA

Second Appellant

And

REBECCA PHILIPS

First Respondent

BARBARA PHILLIPS

Second Respondent

RULING

Application for Stay Pending Appeal
After Dismissal of Appeal against decision of Employment Tribunal
Section # Employment Act (Appeal) Rules 2014

Date of Hearing:	Friday	4 October 2019
Date of Supplemental Filing:	Tuesday	29 October 2019
Date of Ruling:	Friday	15 November 2019

Appellants	Mr. Mark Pettingill and Ms. Victoria Greening (Chancery Legal Ltd)
Respondents	Mr. Peter Sanderson (Benedek Lewin Limited)

RULING of Shade Subair Williams J

Introductory

1. This matter first came before this Court by way of a Notice of Originating Motion against the decision of the Employment Tribunal ("the Tribunal") refusing to adjourn its final hearing ("the interlocutory appeal") and on a Notice of Appeal pleading various grounds of complaint against the Tribunal's final determination ("the substantive appeal").

2. In my judgment delivered on 29 July 2019 I struck out the interlocutory appeal and dismissed the substantive appeal, thereby affirming the award decided by the Tribunal in favour of the Respondents (approximating $70,000). The Appellants subsequently filed a Notice of Appeal dated 9 August 2019 against my judgment and a summons dated 23 September 2019 (but filed on 23 August 2019) for a stay of execution of my judgment ("the stay summons").

3. This Ruling is my decision and reasons on the stay summons.

Summary of Decision on the Strike-out Summons

4. The Tribunal administratively refused the adjournment request but left open a marginal opportunity for the Respondents to formerly make another adjournment application before the Tribunal in person. However, the Appellants refused or failed to attend the Tribunal hearing on the misguided notion that the proceedings were automatically stayed by operation of statute. Having found against the Appellants, I also held that the Tribunal's refusal to adjourn on the papers was not appealable under section 41 of the Employment Act (Appeal) Rules 2014 (also referred to as "the 2014 Rules") since it did not qualify as a "determination" or "order" which was final in nature.

5. I further found that the challenge to the refusal of the adjournment before me would amount to an abuse of process and that the grounds of complaint in the Notice of Originating Motion were accordingly vexatious.

Summary of Decision on the Substantive Appeal

6. The Grounds of Appeal on the Appellants' Notice of Appeal filed on 3 January 2018 were as follows:

   Ground 1

The Tribunal erred in law in proceeding with the hearing of complaint by the Applicants given that an Appeal against an Order of the Tribunal refusing to adjourn the hearing of December 4, 2018, had been filed in the Supreme Court and served on the Respondent causing a Stay of Proceedings in accordance with s. 41 of The Employment Act, notice having been properly given to the Tribunal in advance.

Ground 2

The Tribunal, having been made aware of the reasons for Applicant A's dismissal was wrong in law as not to make full enquiry about issues related to payment for hours not worked and obtaining gasoline without payment. The Tribunal instead accepted a "blatant" denial from the Applicant being unaware of any criminal acts warranting her dismissal. Said failure to make full enquiry was unfair, unreasonable and not in the interest of Justice when the Tribunal is ignoring the Stay of Proceedings, had decided to have a full hearing without the Respondent employer being present. This action was egregiously compounded by the fact that the Applicants were assisted by Counsel in their presentation and accepted without further enquiry by the Tribunal

Ground 3

That Counsel for Applicant A had a duty to disclose that the Applicant had admitted to him in his instructions that she had obtained gasoline and defended the position by the farcical declaration that the money in payment was placed into "petty cash".

Ground 4

That the Tribunal failed to act fairly in making any enquiry of the Applicant B with regard to her alleged acts of dishonesty and seemingly accepted her statement denial as set out in paragraph 20 of the Ruling. The Tribunal made no inquiry about policy or working systems of the Employer Company.

Ground 5

That in particular, given the non-attendance of the Respondent, the Tribunal had a duty in law to make full enquiry and ask questions of the Applicants related to their termination and formally record particulars of such questions and answers.

Ground 6

That the Tribunal was wrong in law (paragraph 24 of the Ruling) to conclude that the Employer was wrong (i)n law "not to have offered the Applicants to speak to the alleged criminal charges and that such was: "A fundamental flaw and is a breach of any respectable code of conduct." The Tribunal was clearly aware that the Applicants had been terminated under S 25 of the Employment Act, Summary dismissal for serious misconduct; and as such no notice or offer to speak with the employees was required.

Ground 7

That the Tribunal erred in law in concluding (at paragraph 29 that) the employer failed to consider a range of disciplinary action under S.24 of the Act when legally he was entitled not to do so given the position of summary dismissal under S.25 of the Act and his position that the Applicants had acted dishonestly and committed criminal offences.

Ground 8

The Tribunal erred in law (in paragraph 30) taking into account that neither Applicant had been approached by the Police to be questioned when the Tribunal were well aware that: a) The police were conducting a full investigation; and b) Had every intention of conducting interviews.

Ground 9

The Tribunal was wrong in law to conclude that (paragraph 32) there was a breach of S 20 of the Act with regard to a termination notice being given by an employer during sick leave, in accordance with S 25 no notice is required and consequently S 20 had no application

7. I dismissed all of the grounds pleaded against the Tribunal's final determination made on 4 December 2018.

8. Grounds 1 and 8 were dismissed on the same reasoning applied in striking out the Notice of Originating Motion.

9. Grounds 2, 4 and 5 were addressed collectively on the basis that the Appellants absented from the Tribunal hearing thereby refusing to partake in the hearing process. This did not transfer the burden of proof from the Appellant employers onto the Tribunal or any other party. In my judgment, the fairness of the proceedings was not compromised by the Tribunal's acceptance of the employee's uncontroverted evidence.

10. I dismissed Ground 3 on the basis that this ground of complaint called for a clear breach of legal professional privilege, contrary to section 15 of the Barristers' Code of Professional Conduct 1981.

11. Grounds 6 and 7 were dismissed because the Appellants' case for serious misconduct under section 25 of the Employment Act 2000 was not proven before the Tribunal as the Tribunal did not find on the evidence that the Respondents had committed any of the wrongful acts as alleged by the employer Appellants. I also found on the uncontroverted facts that any opportunity afforded to the Respondents to address the allegations resulting in the termination of employment occurred subsequent to the termination itself. The true value of any opportunity for the Respondents to defend these allegations was lost once the final decision to terminate was made.

12. At paragraphs 48-50 of my judgment, I provided the following reasoning for having dismissed Ground 9:

> *Section 20 of the Act provides for various termination notice periods according to the frequency of an employee's receipt of remuneration. Section 20(3) prohibits the service of such a notice during an employee's annual vacation, maternity, or bereavement leave. However, section 20(3) exempts an employer from having to apply any of these statutory notice periods where that employer is entitled to summarily dismiss an employee under section 25.*
>
> *Notwithstanding, the Tribunal's primary finding that the dismissal was unfair was attributed to the absence of any persuasive evidence supporting the Appellants' case of criminal misdoing or other like dishonest acts. I find that the Tribunal's final determination would not have changed even if they had correctly found that section 20 did not apply to a summary dismissal route. Seemingly, the Tribunal's consideration of section 20 ties in with their curious attention to the s.24 procedure complained of in Grounds 6 and 7. Be that as it may, it was open to the Tribunal to reasonably find that the case for summary dismissal had not been made out and that the Respondents had been unfairly dismissed.*
>
> *For these reasons, I dismissed this ground of appeal.*

Application to Stay Execution of Judgment Pending Appeal

13. The Second Appellant filed an affidavit in his own name sworn on 22 August in support of the stay summons. At paragraph 5 of Mr. Desilva's affidavit, he deposed:

> *I am advised by my attorneys that the appeal will be rendered nugatory if the Learned Judge's ruling of 29th July 2019 is not stayed and will be rendered nugatory if the Employment Tribunal's award in favour of the Respondents is enforced pending the determination of the appeal.*

14. Mr. Pettingill argued that the Tribunal's award which was affirmed under my judgment is a significant enough sum that monies in satisfaction of that award should be placed in escrow with Chancery Legal Ltd, pending the outcome of the appeal.

15. During Mr. Pettingill's oral submissions, he eagerly reported that the criminal investigation file against the Respondents had finally been submitted to the Director of Public Prosecutions for charge approval and advanced this as a main ground for the application for a stay of execution.

Relevant Legal Principles

16. Section 9(1)(g) of the Court of Appeals Act 1964 empowers the President of the Court of Appeal (or any Justice of Appeal appointed by the President) to make Rules providing for the stay of execution pending the determination of an appeal and the conditions, as to security or otherwise, which may be imposed in an order granting a stay.

17. Order 2/37 of the Rules of the Court of Appeal empowers the full Court or a single Justice of Appeal to stay the execution of any judgment of the Supreme Court until the determination or disposal of the appeal with a proviso that no such application shall be entertained until it is shown that the stay application was first made and refused in the Supreme Court.

18. Section 10 of the Employment Act (Appeal) Rules 2014 provides:

> ***Application of Supreme Court Rules***
> *10 The Rules of the Supreme Court 1985 shall apply mutatis mutandis in respect of matters not expressly provided for in these Rules, in so far as those Rules are not inconsistent with the provisions of the Act or these Rules.*

19. Under Order 47/1 of the Rules of the Supreme Court (RSC) the Court is empowered to stay execution of judgment on two grounds, one of which calls for special circumstances which render it inexpedient to enforce the judgment.

20. RSC Order 47/1 provides:

> ***47/1 Power to stay execution by writs of fieri facias***
>
> *1 (1) Where a judgment is given or an order made for the payment by any person of money, and the Court is satisfied, on an application made at the time of the judgment or order, or at any time thereafter, by the judgment debtor or other party liable to execution—*
>
> *(a) that there are special circumstances which render it in-expedient to enforce the judgment or order, or*
>
> *(b) that the applicant is unable from any cause to pay the money.*
>
> *then, notwithstanding anything in rule 2 or 3, the Court may by order stay the execution of the judgment or order by writ of fieri facias either absolutely or for such period and subject to such conditions as the Court thinks fit.*

(2) An application under this rule, if not made at the time the judgment is given or order made, must be made by summons and may be so made notwithstanding that the party liable to execution did not enter an appearance in the action.

(3) An application made by summons must be supported by an affidavit made by or on behalf of the applicant stating the grounds of the application and the evidence necessary to substantiate them and, in particular, where such application is made on the grounds of the applicants' inability to pay, disclosing his income, the nature and value of any property, whether real or personal, of his and the amount of any other liabilities of his.

(4) The summons and a copy of the supporting affidavit must, not less than four clear days before the return day, be served on the party entitled to enforce the judgment or order.

(5) An order staying execution under this rule may be varied or revoked by a subsequent order.

21. Mr. Sanderson invited me to have regard to the 1999 White Book commentary under Order 59/13/2 which may be broadly paralleled with Order 2/37 of our Rules of the Court of Appeal in that neither provision gives rise to an automatic stay pending appeal. Under both the old English rule of practice and O. 2/37 a stay is granted only by an exercise of judicial discretion.

22. Unlike Order 59/13/2, the Bermuda RSC O.47/1 expressly requires "*special circumstances which render it in-expedient to enforce the judgment or order"* or *"that the applicant is unable from any cause to pay the money".*

23. Special circumstances simply means outside of ordinary circumstances. This means that the ordinary position, at which one starts, is that a stay will not be ordered. However, where there are special circumstances which give rise to a good reason for imposing a stay, as a matter of common sense, a stay of enforcement should be ordered. To state the obvious, this will vary and depend on the facts of each case. The Court must strike the right balance between the creditor's rights to closure and collection of the judgment goods and debtor's rights and realistic ability to be reimbursed for the payment wrongly awarded, if successful on appeal.

24. The following passage from the White Book offers valuable guidance on the exercise of judicial discretion in considering whether or not to grant or impose a stay:

"*…Neither the court below nor the Court of Appeal will grant a stay unless satisfied that there are good reasons for doing so. The Court does not "make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which prima facie he is entitled", pending an appeal (The Annot Lyle (1886) 11 P. 114 at 116, CA; Monk v.*

Bartram [1891] 1 Q.B. 346); and this applies not merely to execution but to the prosecution of proceedings under the judgment or order appealed from – for example… … But the court is likely to grant a stay where the appeal would otherwise be rendered nugatory (Wilson v. Church (No.2) (1879) 12 Ch.D.454 at 458,459, CA), or the appellant would suffer loss which could not be compensated in damages. The question whether or not to grant a stay is entirely in the discretion of the court (Becker v Earl's Court Ltd (1911) 56 S.J. 206; The Ratata [1897] P. 118, p. 132; Att-Gen. v. Emerson (1889) 24 Q.B.D. 56 at 58, 59) and the court will grant it where the special circumstances of the case so require. Execution might be stayed, for example, where the judgment is in favour of a person resident out of, or about to leave, the jurisdiction (see Wooton v. Sievier (1913) 30 T.L.R. 165, CA). And if, under an order of the court, money is to be paid out of a fund and distributed among a large number of persons resident abroad, an injunction may even be granted, restraining dealings with the fund pending an appeal…

Where the appeal is against an award of damages, the long established practice is that a stay will normally be granted only where the appellant satisfies the court that, if the damages are paid, then there will be no reasonable prospect of his recovering them in the event of the appeal succeeding (Atkins v Great Western Railway Co. (1886) 2 T.L.R. 400, following Barker v. Lavery (1885) 14 Q.B.D. 769, CA… Nowadays the court may be prepared (provided that the appeal has sufficient merit) to grant a stay, even where the test is not satisfied, if enforcement of the money judgment under appeal would result in the appellant's house being sold or his business being closed down. But if such a stay is granted the court should impose terms which (so far as possible) ensure that the respondent is paid without delay, if the appeal fails, and that appellant is prevented from depleting his assets in the meantime, except for any necessary expenditure. This approach was endorsed in Lynotype-Hell Finance Ltd v. Baker [1992] 4 ALL E.R. 887 (Staughton L.J., sitting as a single Lord Justice). It was also endorsed in Winchester Cigarette Machinery Ltd v. Payne (No.2) (1993) The Times, December 15, but the Court made it clear that a stay should only be granted where there are good reasons for departing from the starting principle that the successful party should not be deprived of the fruits of the judgment in his favour. The Court also emphasised that indications in past cases do not fetter the scope of the Court's discretion."

25. Mr. Pettingill eagerly pointed to the below remarks of Gibson LJ in *Winchester Cigarette Machinery Ltd v. Payne (No.2) (1993) The Times, December 15; [1993] Lexis Citation 3170:*

"But as Lord Justice Staughton said, quite recently, the practice of the court has moved on, and I believe that he (appearing Counsel, Mr. Nearman) *is right when saying that one approaches this really as a matter of common sense and balance of advantage; as indeed this court did in a case on which I and Lord Justice Steyn sat n 13th July of last year called*

Jean-Pierre Malliez v Redland Plasterboard Overseas Limited and Another, where circumstances similar, but not identical, to this case, we granted a stay of a taxation of costs pending the appeal and at any rate a partial stay on the assessment of damages which had been ordered at first instance."

26. It is worth reading on:

"*I respectfully agree with the approach of Balcombe LJ to the question, namely that one starts with the assumption that a successful Plaintiff is not to be prevented from enforcing his judgment even though an appeal is pending. I also agree that the practice of the court has moved on, in that the increased work of the court has produced more examples of "other reasons" in addition to proved improbability of recovery which Lord Esher MR contemplated in Atkins v Great Western Railway Company. I do not disagree with the formulation "balancing of advantage", provided that, in holding that balance, full and proper weight is given to those starting principles, that there must be good reason to deprive a successful Plaintiff of the right to enforce his judgment and that the mere existence of an arguable ground of appeal is not by itself such a reason*."

Decision

27. The Respondents (ie the former employees) have undergone two tiers of litigious proceedings, both of which resulted in findings in their favour. The terminations of employment occurred in April 2018 and the Tribunal hearing proceeded some 7 months thereafter on 4 April 2018 when the award was made. No payment was made on the award during the 15-month period which lapsed between the granting of the award and the hearing of the appeal. Since 29 July 2019 when I further affirmed the Tribunal's award, no payment under my Order was made by or on behalf of the Appellant. The hearing of the appeal before the Court of Appeal is anticipated to be listed in March 2020.

28. In exercising my discretion, however, I have given careful thought to the merits of the appeal grounds filed, which I consider to be minimal but just short of unarguable. I accept Mr. Pettingill's classification of the $70,000 award as 'significant' even for a solvent and financially able litigant such as the Appellants. These points must be measured against the Respondents' current financial resources. Ms Barbara Phillips, although once employed as a caregiver subsequent to her termination of employment under the Appellant, is now unemployed and without any known source of real income. Ms. Rebecca Phillips, on the other hand is gainfully employed in the Department of Social Services and earns a modest net salary of $739.66 per week. While Respondents' fiscal limitations may invoke sympathy for the prolonged non-payment of the award, it also opens them up to my real

concern that they may likely spend the fruits of the award without finding themselves able to reimburse the Appellants on the not-so-foreseeable chance that judgment is reversed on appeal.

29. For these reasons, I grant the Appellant's application to stay execution of the judgment on the condition that the judgment sum ie. the total sum awarded by the Tribunal, should be paid in escrow into a client trust account held by Chancery Legal Ltd. within 21 days from the date of this Ruling. The said sum shall be paid in full to the Respondents within 7 days of the disposal of the appeal (in the event that the appeal is dismissed and my 29 July 2019 Judgment is upheld) or by 30 April 2020, whichever date is the sooner, subject to further order by this Court or the Court of Appeal.

Dated this 15th day of November 2019

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HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT