



In The Supreme Court of Bermuda
CIVIL JURISDICTION
2016 No: 218

BETWEEN:

DAVID LEE TUCKER

Plaintiff

And

HAMILTON PROPERTIES LIMITED

Defendant

EX TEMPORE CHAMBERS RULING

Ex parte Application for Leave to Appeal (s. 12(2) of the Court of Appeal Act 1964)
Appeal against Interlocutory Ruling on Strike-Out Application (RSC O. 18/9)

Date of Hearings: Thursday 1 March 2018

Date of Reasons: Tuesday 6 March 2018

Applicant Mr. Matthew Godfrey (Appleby (Bermuda) Limited)

REASONS of Shade Subair Williams A/J

Introductory and Summary

1. This is an ex parte application (on notice) for leave to appeal against an interlocutory ruling made on 11 December 2017 on an application to strike out a writ of summons. Although not readily discernable from the Plaintiff's pleadings, there were multiple claims made which arose out of an employment contract ending in dismissal.

2. The strike out application was heard before me, as Registrar sitting with the powers¹ of a Judge in Chambers, on 26 and 31 October 2017. The background and relevant facts are set out in my strike-out ruling: see *D Tucker v Hamilton Properties Ltd. [2017] SC (Bda) 110 Civ (11 December 2017)*.
3. On 1 March 2018, I gave my decision on Grounds A and C *extempore* and granted leave to appeal. I reserved on Ground B against which I now refuse leave.
4. A brief outline of my reasons is set out below.

SUMMARY OF THE CLAIMS AND DECISIONS ON STRIKE OUT APPLICATION

5. The causes of action originally pleaded in the writ were as follows:
 - (i) Breach of employment contract;
 - (ii) Unfair dismissal and wrongful dismissal;
 - (iii) Unlawful discrimination by reason of age and disability;
 - (iv) Unlawful discrimination by reason of place of origin;
 - (v) Unlawful discrimination by reason of trade union affiliation; and
 - (vi) Breach of freedom of association
6. There were various claims for breach of contract, some of which were struck out and others allowed. The claims which were struck out were dismissed on the basis that, in reality, they were disguised statutory claims for unfair dismissal. One of the claims allowed for breach of contract is the subject of this application.
7. I categorically struck out the claims for unfair dismissal and wrongful dismissal in addition to the claim for unlawful discrimination by reason of age. No complaint is made on any of these decisions.
8. I allowed the claim for unlawful discrimination by reason of place of origin. No complaint is made in relation to this claim.
9. On the claim for breach of the Plaintiff's right to freedom of association, I found that it was curable by an amendment of the writ so to substitute the claim with a discrimination claim.

¹ For the judicial powers of the Registrar, see Order 32 Rule 11 and see *Michael Paulo v Damon Simmons [2016] SC (Bda) 109 Civ (9 December 2016) paras 18-20* on Jurisdiction of Registrar.

Law on Appeals against Interlocutory Decisions

Requirement for Leave to Appeal against Interlocutory matters

10. Section 12(2) of the Court of Appeal Act 1964 provides as follows:

“No appeal shall lie to the Court of Appeal –
(a) against a decision in respect of any interlocutory matter; or
(b) against an order for costs,
except with leave of the Supreme Court or the Court of Appeal.”

Application Procedure

11. Order 2/3 of the Rules of the Court of Appeal outlines the application procedure in respect of leave to appeal:

“3(1) Where an appeal lies only by leave of the Court or of the Supreme Court, any application to either Court shall be made by notice of motion ex parte in the first instance and the following provisions shall apply:

- (a) where the application is made to the Supreme Court, the notice of motion shall be filed with the Registrar of that Court not later than fourteen days after the date of the decision of the Supreme Court;*
- (b) if the application is refused by the Supreme Court and the intending appellant desires to apply to the Court for leave to appeal, he shall file his notice of motion with the Registrar not later than seven days after such refusal;*
- (c) unless the application (whether to the Court or to the Supreme Court) is dismissed or it appears to the Court to which the application is made that undue hardship would be caused by an adjournment, that Court shall adjourn the application and give directions for the service of notice thereof upon the party or parties affected;*
- (d) if leave to appeal is granted by the Supreme Court, the appellant shall file a notice of appeal;*
- (e) where leave to appeal is granted by the Court, the time, prescribed by Rule 2 of this Order, within which notice of appeal must be filed shall run from the date when such leave is granted.*

(2) *Every notice of motion filed in pursuance of paragraph (1) of this Rule shall set out the grounds of the application and shall be accompanied by an affidavit in support thereof and by a statement of the grounds of the intended appeal formulated in accordance with Rule 2 of this Order.*”

Applicable test in determining Application for Leave

12. At paragraph 6 of the Applicant’s skeleton argument, it is submitted:

*“Pursuant to the case of Avicola Villalobos SA v Lisa SA and Leamington Reinsurance Co Ltd [2007] Bda LR 81, which in turn cited the case of The Iran Nabuvat [1990] 1 WLR 1115, in which Lord Donaldson of Lymington stated “no one should be turned away from the Court of Appeal if he had **an arguable case** by way of appeal” (p. 1117 – emphasis added) and “That is really what leave to appeal is directed at, screening out appeals which will fail.” ”*

13. I accept that this submission correctly states the applicable test for determining whether to grant leave to appeal.

Single Justice of Appeal may determine Interlocutory matters

14. Section 14 of the 1964 Act reads:

“To the extent prescribed by Rules the powers of the Court of Appeal to hear and determine any interlocutory matter may be exercised by any Justice of Appeal in the same manner as they may be exercised by the Court of Appeal and subject to the same provisions:

Provided that every order made by a Justice of Appeal in pursuance of this section may, on application by the aggrieved party and subject to any Rules, be discharged or varied by the Court of Appeal.”

15. Order 2/38 of the Rules of the Court of Appeal provides:

“38 (1) In any cause or matter pending before the Court, a single Judge may hear, determine and make orders on any interlocutory application.

(2) Any order made by a single Judge in pursuance of this rule may be discharged or varied by the Court on the application of any person aggrieved by such order.”

Intended Grounds of Appeal

GROUND A:

16. In relation to the claims for breach of employment contract, I allowed the Plaintiff to proceed with various claims for breach of the employment contract, particularized as follows:

- (i) The Defendant's failure to institute a minimum 3 day work week system;
- (ii) The Defendant's failure to provide adequate training and support staff to the Plaintiff for the carrying out of his duties;
- (iii) The Defendant's failure to take reasonable care in ensuring the Plaintiff's health, safety and welfare at work by requiring the Plaintiff to carry on heavy-lifting despite his back ailments;
- (iv) The Defendant's change of the Plaintiff's written job description (without consultation); and
- (v) The Defendant's discrimination against the Plaintiff because of his trade union affiliation with the BIU in contravention of Article 9 of the Collective Bargaining Agreement (CBA)

17. It is the final item (v) which is the target of Ground A. The Applicant argues that the recital in the CBA on the prohibition of discrimination is lifted directly from a provision in the Employment Act 2000. The only relief available in answer to such a complaint would be through a statutory claim for unfair dismissal. Having found that the Court has no jurisdiction to adjudicate a statutory claim for unfair dismissal, it is clearly arguable that I ought to have struck out this particular complaint made at (v) above. For these reasons, I find that there is sufficient merit in this ground of appeal for leave to be granted.

GROUND B:

18. At paragraph 65 of my Ruling I stated:

“The Defendant's Counsel argued that Mr. Tucker failed to report any grievances for bullying and discrimination at the time of the alleged acts. Mr. Godfrey submitted that

the discrimination allegations are baseless allegations of fraud. Counsel further argued that such allegations should be, but are not, supported by prima facie evidence on the face of the documents before the Court. Mr. Godfrey suggested that such allegations are, therefore, a breach of the Bar code and are also scandalous, frivolous and vexatious and a clear abuse of process.”

19. At paragraph 26 of the Applicant’s skeleton argument, it is stated:

“References to “fraud” made by Counsel in these submissions were in respect of allegations of fraud made by the Plaintiff in the Affidavit of David Tucker dated 9 October 2017 at paragraph 14. The Plaintiff makes allegations that documentary evidence submitted by the Defendant, and attached to the Affidavit of Allan Trew dated 14 September 2017 was manipulated, i.e. fraudulent.”

20. I have taken this ground at its highest and find that even if the Court of Appeal finds that I mischaracterized the Defendant’s submission on the fraud allegation, it would have no likely impact on the merits of the appeal beyond Grounds A and C. I find that this is not an arguable ground of appeal. It stands more so as a passing point for correction than a meritorious ground of appeal. For these reasons, I refuse leave to appeal on this ground.

GROUND C:

21. In my 11 December 2017 ruling, I found that the claim for breach of the Plaintiff’s rights to freedom of association was curable by an amendment. I ruled that the original claim could properly be substituted with a claim of unlawful discrimination by reason of the Plaintiff’s beliefs or political opinions in contravention of section 2(2)(vi) of the Human Rights Act 1981 as read with section 6 of the 1981 Act. This finding is the subject of the complaint made by the Applicant at Ground C.

22. I allowed leave to appeal on this ground on the basis that the Plaintiff voluntarily withdrew this original claim during the course of the strike-out application hearing. On that basis, I found that there is an arguable case on appeal that this claim ought to have been struck out.

Conclusion

23. Leave to appeal in respect of Ground A and Ground C is granted. In respect of these two grounds, the Appellant has 7 days within which to file a Notice of Appeal from the date of this decision in compliance with Order 2/2(1)(a) of the Rules of the Court of Appeal.
24. Leave to appeal on Ground B is refused and the Applicant is directed to file a Notice of Motion no later than 7 days after the date of this decision in compliance with Order 2/3(1)(b) of the Rules if it is intended that the application for leave will be renewed before the Court of Appeal.
25. Upon the filing of a Notice of Appeal and or Notice of Motion in respect of the renewal application, the Acting Registrar is directed to expeditiously issue a Summons to settle the record of appeal pursuant to Order 2/7.

Dated this 6th day of March 2018

SHADE SUBAIR WILLIAMS
ACTING PUISNE JUDGE OF THE SUPREME COURT