

IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA) , A. Fernando (J.A) , M. Twomey (J.A)]

Civil Appeal SCA 18/2013

(Appeal from Supreme Court Decision CA 21/2012)

Philip Cointy

Appellant

Versus

Beau Vallon Properties

Respondent

Heard: 18 August 2015

Counsel: Mr. Frank Elizabeth (SC) for the Appellant

Mr. Pesi Pardiwalla for the Respondent, together with
Miss Zara Pardiwalla

Delivered: 28 August 2015

JUDGMENT

F. MacGregor (PCA)

[1] The appellant was employed by the respondent on 27th January, 2011 as the operations director at the Hotel Coral Strand, Seychelles. For some reason, his employment contract was terminated on 26th October, 2011.

[2] In terms of the provisions the Section 61 of the Employment Act, the appellant filed his grievance with the Ministry of Employment for mediation by a competent officer. The mediation ended unsuccessfully and a certificate to that effect was issued on the 6th December, 2011.

- [3] The appellant approached the Employment Tribunal and filed an application on 13th January, 2012, alleging unfair dismissal and claiming monetary damages for the terminated contract.
- [4] At the hearing, the respondent raised a preliminary point of law *in limine*, that the application had been filed out of time and was therefore afoul of section 61 (1E) of the Employment Act. The Employment Tribunal agreed with the respondent and the appellant's application was dismissed. In accepting the position of the respondent, the Employment Tribunal considered that mediation had ended on 1st December, 2011. In counting the days, it excluded public holidays between the period of 2nd December and 13th January, 2012. Those were 8th, 25th and 26th December, 2011 as well as 1st and 2nd January, 2012.
- [5] Dissatisfied with the decision, the appellant proceeded to the Supreme Court to appeal. He argued that time started running when the certificate of mediation was issued by the competent officer, and therefore, he had filed his application in time. The respondent on the other hand argued that time started counting from the date the mediation was verbally declared failed. The Supreme Court held that the time started counting from the date the mediation failed, the date verbally pronounced, the 1st December, 2011. It excluded the day the decision was pronounced. Based on the Public Holidays Act, the Supreme Court also excluded all public holidays as well as all the Sundays within the period in question. Thus the days 4th, 8th, 11th, 18th, 25th, 26th December, 2011, and 1st, 2nd, 3rd and 8th January 2012 were excluded. That meant that there were 33 days between 2nd December and 13th January 2012 and therefore the appellant had filed his application out of the 30 days prescribed by the Act. There was no provision for the Employment Tribunal to exercise discretion and enlarge time for the appellant, and therefore, he was out of time. The Court further held that no plausible explanation had been given to condone the delay.

- [6] Dissatisfied with the reasoning of the Supreme Court, the appellant has approached this Court to appeal the decision.
- [7] Prior to the hearing of this appeal, the respondent raised a point of order in that the appellant had filed his heads of arguments out of time and had not obtained leave of the Court to do so. In response, the appellants counsel explained that the reason for delay was that, his client being a foreigner, and based abroad, it was difficult to consult with him, but that he had instructions, in principle, to prosecute the appeal.
- [8] The Court considered the appellants explanation to be good cause and in the interest of justice, condonation was granted.
- [9] The points of appeal are that -
The learned Judge erred in law when he dismissed the appellants appeal on grounds that the appellant was out of time by 3 days when the appellant filed his grievance before the Employment tribunal.
- [10] The appellant argues that time started running from the date the certificate of mediation was issued and served. He counts 37 days from the date the certificate was issued under section 61 (1D), 6th December, 2011. Discounting the 9 public holidays (in between) as per the law, that gives him 28 days and therefore, he filed his application within time.
- [11] On the other hand, the respondent argues that the certificate of mediation is only evidence that mediation steps have been undergone by the parties, and that time starts to count the day mediation fails, the day parties disagree mediation is called off, 1st December, 2011. It counts the 43 days from 2nd December, 2011-13th January, 2012 when the appellant filed his application. Discounting the 10 public holidays, the respondent argues that appellant filed his application 33 days later and therefore 3 days out of time.

[12] The relevant provision here is section 61 of the Employment Act. It reads;

61. (1) A worker-

(a) Whose contract of employment is terminated-may initiate the grievance procedure.

(1A) where a worker or employer has registered a grievance, the competent officer shall endeavour to bring a settlement of the grievance by mediation.

(1B) A competent officer in mediating a settlement, shall draw up a mediation agreement which shall be signed by the parties and be presented to the Tribunal for endorsement as a form of judgment by consent.

(1C) If a party breaches the mediation agreement or any part thereof, the agreement shall be enforced by the Tribunal.

(1D) If the competent officer is unsuccessful in the mediation he shall issue a certificate to the parties as evidence that mediation steps have been undergone by such parties.

(1E) A party to a grievance shall bring the matter before the Tribunal within 30 days if no agreement has been reached at mediation.

[13] What is contested in the appeal is whether the dispute to the Employment Tribunal was filled within the 30 days, prescribed by section 61 (1E) of the Employment Act.

[14] Mediation is described as a form of alternative dispute resolution (ADR), a way of resolving disputes between two or more parties with concrete effects. Typically, a third party, the mediator assists the parties to negotiate a settlement.

- [15] Under the Employment Act, mediation is the first tier of dispute resolution in labour disputes. In the event that the mediation is not successful, the certificate of mediation is the formal document that mediation has been conducted, albeit unsuccessfully. The Employment Tribunal will not entertain the dispute unless it has been dealt with by ‘a competent officer’ at mediation.
- [16] Section 61(1D) must be read in the context of Section 61 (1B) which provides for the measure to be taken where the mediation is successful. While section 61 (1B) triggers operation of section 61 (1C), section 61 (1D) triggers operation of section 61 (1E). Action by the competent officer therefore triggers the next course of action that any party to the dispute may take. The matter moves from the ambit of the competent officer either under section 61 (1B) or Section 61 (1D).
- [17] But what would be the reason for the legislature to require a certificate to be issued? And what is the significance of the certificate *vis a vis* the filling of the appellants grievance to the Employment Tribunal?
- [18] The respondent argued before us that Section 61 (1D) of the Employment Act spells reasons why the certificate has to be issued, “*..as evidence that mediation steps have been undergone by such parties.*” That the certificate is of little significance as far as counting of time is concerned.
- [19] The certificate of mediation is dated 6th December, 2011. In the certificate, there is no indication as to when the mediation commenced and when it ended. It was not shown to us when the appellant received the certificate of mediation.
- [20] We are unable to agree with the position of the appellant that in the proper interpretation of the law, time would only start running from the time the appellant

received the certificate of mediation.

- [21] We must agree with the Judge that a proper interpretation of the law would be that time starts to run from the day mediation was concluded and not when the certificate of mediation was served on the appellant.
- [22] The question we are left with is, when should we say mediation ended? It should be the date when the last activity to conclude the mediation was done. If the mediation was successful, the competent officer would have drawn an agreement. Now that it was not successful, he issued a mediation certificate. That was the last activity to conclude the process.
- [23] This Court is minded to give textual, contextual and purposive interpretation to the Employment Act. Sections of the Act must be read together and not in isolation.
- [24] In the matter of Michel v Talma [2012] SLR 95, this court held that –
“..the historical basis for the limitation of actions is one based in equity, namely that “equity defeats delay.” Limitation periods by their very nature curtail the right or ability of a plaintiff to pursue a claim. For this reason they require strong justification...”
- [25] Mediation as required by the Act must come to an end, with one result or the other. Each result can only be known by the record the competent officer presents. We hold that time started counting from the date the competent officer issued the certificate, the 6th December, 2011. We therefore count the days from the 7th December, 2011-13th January, 2012. As provided by the Public Holidays Act, we exclude the 8th, 11th, 18th, 25th, 26th December, 2011, and 1st, 2nd, 3rd and 8th January 2012. Granted, the Appellant filed his application at the Employment Tribunal on the 28th day and therefore within time.

[26] For the reasons above, the appeal succeeds, and the matter shall be remitted to the Employment Tribunal for determination on merits.

[27] We also find it noteworthy to point out a few items here. The time contested in this case is an alleged delay of 3 days. In the matter of Public Utilities Corporation v Elisa (2011) SLR 100 this Court held that “*..the trend to-day is that so long as there is substantial compliance., adherence precisely to the time element should not be fatal to the claim..*” No prejudice would have been suffered by the respondent if the dispute of the appellant was heard and determined on merits.

[28] It would also be important for us to point out that the legislature could consider providing provision in the Employment Act, for application for leave to apply out of time whenever someone may be late in their application to the Employment Tribunal. Maybe it should also be considered that Saturdays are not working days and should be included in the Public Holidays Act.

[29] The Court also takes judicial notice that every December in Seychelles, is a particular high pressure period. The Supreme Court being on vacation, many attorneys and staff also choose this period for their leave. It is a period we can understand for people, like the appellant being challenged for being late or out of time.

F. MacGregor (PCA)

I concur:.

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A. Fernando (J.A)

I concur:.

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M. Twomey (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 28 August 2015