

COINTY v BEAU VALLON PROPERTIES
(2013) SLR 43

F Elizabeth for the appellant
P Pardiwalla for the respondent

15 April 2013

CA 21/2012

The judgment was delivered by BURHAN J

[1] By ruling dated 24 May 2012, the Employment Tribunal proceeded to dismiss the application made to the Tribunal by the appellant. The Tribunal upheld the preliminary objection of the respondent that the application filed in the Tribunal by the appellant was out of time and therefore not in conformity with s 61(1E) of the Employment Act, as amended by Employment (Amendment) Act 21 of 2008.

[2] This is an appeal against the said ruling.

[3] Section 61(1E) of Employment Act reads as follows:

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

[4] The background facts of the case are that the appellant who was employed as an Operational Director by the respondent registered a grievance against the respondent in terms of s 61(1) of the Employment Act before the competent officer, on the grounds of being unfairly dismissed from service.

[5] In terms of s 61(1A) of the Employment Act, the competent officer endeavoured to bring about a settlement of the grievance by mediation but failed. Thereafter, as permitted by s 61(1E) as set out above, as no agreement was reached by the parties at the mediation proceedings before the competent officer, the appellant proceeded to file an application on 13 January 2012 before the Employment Tribunal. The appellant alleged unfair dismissal and claimed monetary benefits up to the end of the contract as set out in the mediation certificate MED/R/198/11 dated 6 December 2011, annexed to his application dated 13 January 2012. It appears a further amended application was filed on 23 February 2012 on the grounds that the appellant continued to incur additional financial loss as a result of the unfair termination of his employment.

[6] According to the proceedings and submissions made by counsel, it is common ground that mediation was completed on 1 December 2011.

[7] It is counsel for the appellant's contention that the time period would run from the date on which the certificate issued in terms of s 61(1D) was served on the appellant which in his submission was after 6 December 2011, the date of the certificate.

[8] Section 61(1D) reads as follows:

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 the parties.

[Emphasis added]

[9] Section 61(1E) sets out that the application to the Tribunal shall be brought “within 30 days if no agreement has been reached at mediation”. There is no mention in this section of the application being brought within 30 days after the parties have been served with a certificate that the mediation has failed. On consideration of s 61(1D) as set out above, it is the view of this Court that the intention and purpose of issuing the certificate is to indicate that parties have complied with the requirement set out in s 61(1A) of the Act, in that they have taken mediation steps and not come directly to the Tribunal circumventing mediation as the section specifically states that a certificate shall be issued “as evidence that mediation steps have been undergone by the parties.” Therefore this section has no bearing on s 61(1E) of the Act as suggested by counsel for the appellant.

[10] Counsel for the respondent's contention is that the appellant was present at the said mediation and therefore should have been well aware that no agreement had been reached by the parties at the mediation on 1 December 2011. Section 61(1E) specifically states that the application to the Tribunal shall be brought within 30 days if no agreement has been reached at mediation. There is no indication by the appellant that he was not present at the mediation or that he was unaware of the fact that no agreement had been reached at the mediation until he received the certificate. Further, Maxwell on the Interpretation of Statutes (1991 ed) at page 8 states:

When an Act gives persons aggrieved by order of justices a certain period after making of the order for appealing ... the time runs from the day in which the order was verbally pronounced and not from the day of service.

[11] Therefore it is the view of this Court that the time period would start running from the date that the mediation was concluded with no agreement reached and not from the day the certificate was served on the appellant. In the light of the aforementioned reasoning, I find no merit in the contention of counsel for the appellant.

[12] Section 57(1)(a) of the Interpretation and General Provisions Act (Cap 103) (hereinafter referred to as the Interpretation Act) reads as follows:

In computing time for the purposes of an Act

(a) A period reckoned by days from the happening of an event or the doing of any act or thing is exclusive of the day on which the event happens or the act or thing is done.

[13] Therefore as mediation was held and concluded on 1 December 2011, this day should be excluded and the counting of the period of time would commence

in this instant case from 2 December 2011. The application before the Tribunal was filed on 13 January 2012. Based on s 57(1)(a) of the Interpretation Act, the period of 30 days would begin to run from 2 December 2011 and the total period up to 13 January 2012, the date the application was filed by the appellant in the Employment Tribunal would therefore be 43 days in this instant case.

[14] Section 57(1)(d) of the Interpretation Act reads as follows:

Where the last day of a period is an excluded day, the period includes the next following day not being an excluded day.

[15] Section 57(4) of the said Act refers to an "excluded day" means a public holiday or a bank holiday declared under s 51 of the Financial Institutions Act.

[16] It is to be noted however in this instant case the last day of the period of 30 days does not fall on an excluded day.

[17] Sections 2, 3 and 4 of the Public Holidays Act read as follows:

Section 2

The several days specified in the Schedule to this Act (hereinafter referred to as "public holidays") shall be kept, except as hereinafter provided, as close holidays in all courts of law, in all Government offices and in all banks in Seychelles and shall be legal holidays for all persons throughout Seychelles.

Section 3

An act required to be done by or before a judge or officer of any court or by or before any Government official upon any day which is a public holiday may be lawfully done upon the day not being itself a public holiday, next following such first mentioned public holiday.

Section 4

Where any public holiday except Sunday falls on a Sunday the next following day, not being itself a public holiday, shall be a public holiday.

[18] On a reading of these sections based on the law and in the interests of justice, it would be appropriate to exclude all public holidays from the 30 day period. Therefore in this instant case as per the Schedule of s 2 of the Public Holidays Act, the following could be considered as public holidays. All Sundays (in some jurisdictions referred to as a "dies non"), 8 December 2011 ie the feast of Immaculate Conception, Christmas day, in this instant case as Christmas day had fallen on a Sunday 26 December 2011 could be considered as a public holiday. The first and second January 2012 could be treated as public holidays and once again as Sunday had fallen on a public holiday ie 1 January 2012, 3 January has been proclaimed as a public holiday: refer Proclamation of Public Holiday SI 94 of 2011.

[19] Excluding all public holidays (including Sundays) as mentioned above would result in the following days namely 4, 8, 11, 18, 25, 26 December 2011 and 1, 2, 3 and 8 January 2012 being excluded. This would result in a total of 10 days being excluded from the 43 days. Therefore time period taken by the appellant for the filing of the application to the Employment Tribunal has been 33 days.

[20] Section 61(1E) of the Employment Act refers to the application being filed within 30 days. The phrase "within 30 days if no agreement has been reached at mediation" as set out in s 61(1E) encompasses a limited time span. Where something is to be done "within" a stated time that means, it is to be done at some time during the course of the stated time immediately preceding the stated date.

[21] In Black's Law Dictionary the word "within" when used in relation to time, has been defined as meaning any time before, at or before, at the end of, before the expiration of, not beyond, not exceeding, not later than. In Stroud's Judicial Dictionary of Words and Phrases (8th edition), it is more frequently used to delimit a period inside which certain events may happen. The words within 30 days in the said section in the view of this Court, restricts the right of the appellant to file application beyond the time frame of 30 days given. The appellant in this case has filed it after this period and even on considering the submissions of counsel for the appellant no plausible explanation has been given by him up to date to condone the delay.

[22] Further I am inclined to agree with the finding of the Employment Tribunal that in terms of Schedule 1 Part 11 paragraph 2(3) of the Employment Act 1995, specific provision is provided for by law for the competent officer to use his discretion to allow a grievance to be registered after the prescribed period of 14 days. In s 61(1E) relevant to an application before the Tribunal no such discretion is available in law. Therefore in the view of this Court the words "shall bring the matter within 30 days" in s 61(1E) is imperative in nature and restricts the right of the appellant to file an application beyond the timeframe of 30 days given and casts a mandatory duty that the application be filed within the prescribed time. The appellant in this case has failed to file his application within the prescribed time as set out in s 61(1E) of the Employment Act.

[23] For the aforementioned reasons the appeal is dismissed with costs.