[2019] JMCA App 15

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NOS 142 & 206/2018

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE F WILLIAMS JA
THE HON MR JUSTICE FRASER JA (AG)

BETWEEN	**HOPETON MURRAY**	**APPLICANT**
AND	**MINISTRY OF TOURISM ENTERTAINMENT & CULTURE**	**1ST RESPONDENT**
AND	**THE ATTORNEY GENERAL**	**2ND RESPONDENT**

Matthew Gabbidon instructed by John S Bassie & Co for the applicant

Mrs Taniesha Rowe-Coke instructed by the Director of State Proceedings for the respondents

29 April 2019

MORRISON P

[1] We have two applications before us this morning. The first is Application No 141/2018 ('the first application'), which was filed on 25 September 2018. This is an application by the applicant for an extension of time within which to appeal against certain orders made in favour of the respondent by Straw J (as she then was) on 29 January 2018.

[2] The second application is Application No 206/2019 ('the second application'), which was filed on 19 September 2018. This is an application by the applicant for

extension of time within which to appeal against a judgment given by K Anderson J on 23 February 2018.

[3] Both applications have a common background. On 29 January 2018, the parties went before Straw J, who made interlocutory orders relating to the conduct of the trial of the action which was scheduled to take place the following month before K Anderson J. By her orders, Straw J granted permission for a witness statement filed on behalf of the respondent and the respondent's amended defence to be allowed to stand as having been filed in time; and an extension of time within which the respondent should file skeleton submissions and supporting authorities.

[4] The matter then proceeded to trial before K Anderson J on 23 February 2018, at the end of which judgment was given dismissing the applicant's claim against the respondent.

[4] With regard to the first application, which is an application relating to an interlocutory order, it is clear that what the applicant needed to apply for was leave to appeal against that order. No such permission was sought or granted. And, even now, what the applicant seeks from this court is not leave to appeal against Straw J's orders out of time, but extension of time within which to file an appeal. So that, as it seems to us, the procedure that has been adopted in relation to Straw J's orders is completely wrong and the first application should perhaps be refused on that ground alone.

[6] But, in any event, we would also make the comment that we would have thought that it was the applicant's duty, if he were dissatisfied with them, to seek leave to appeal

against Straw J's orders immediately they were made, at any rate certainly before the commencement of the trial before K Anderson J. Instead, the applicant participated in the trial before K Anderson J, keeping the potential of an appeal against Straw J's prior orders in reserve, so to speak, in the event he did not succeed before K Anderson J.

[7] Accordingly, even if we were able to extend time within which to appeal on this application, it seems to us that the circumstances are not such as to attract the exercise of this court's discretion in the applicant's favour. The first application is accordingly dismissed.

[8] The second application relates to the judgment in the action given against the applicant by K Anderson J on 23 February 2018. There is no question that, this being the final judgment in the action, the applicant was obliged to filed notice of appeal within 42 days of the date of judgment (Court of Appeal Rules 2002, rule 1.11(1)(c)). This he did not do. Instead, the notice of appeal was filed on 26 June 2018, that is, more than two months out of time. Indeed, it was only when the Registrar of the Court of Appeal wrote to the applicant's attorneys-at-law on 18 July 2018 to advise that the notice of appeal had been filed out of time that it was realised that the appeal had been filed late.

[9] The explanation for the late-filing given by Mr Gabbidon, which we accept, is that he was operating on the basis of the un-amended Court of Appeal Rules, by virtue of which time did not begin to run against a potential appellant until the formal order carrying the judgment of the court below was served. That rule was amended in 2015 to its present form, by virtue of which the 42 days begin to run from the date of the

judgment. So, in this case, judgment having been given on 23 February 2018, the period for filing the appeal would have expired in early April 2018.

[10] But Mrs Rowe-Coke also brings another point to our attention, which is that, even after having been advised by the Registrar by letter dated 18 July 2018 that the appeal was out of time, this application for extension of time was not filed until a further two months later, that is, on 25 September 2018. As Mrs Rowe Coke correctly points out, an applicant in this position is required to provide some explanation for the delay and to show that he has an appeal with a reasonable prospect of success (see **Leymon Strachan v Gleaner Company Ltd** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 12/1999, judgment delivered 6 December 2009).

[11] We have already covered some of what the applicant has put forward as the explanation for the delay, in particular counsel's misapprehension of the applicable rules of the court. But, even if this were an acceptable explanation - which we do not think it is, given that the amendment to the rules was a three-year old amendment - that would not explain the further delay of two months between July and September 2018 when the application for extension of time within which to appeal was finally made.

[12] However, as Mrs Rowe-Coke also quite properly accepted, delay is not the overriding criterion on such an application and the court is nevertheless still required to consider the merits of the proposed appeal.

[13] The applicant's claim against the respondent was for damages for breach of contract of employment. He contended that the 1st respondent had permanently

employed him to the position of Director, Special and Commemorative Events, but had failed to remunerate him at the level appropriate to that position. The 1st respondent's defence, which the judge accepted, was that the applicant had been seconded to that position, but had lawfully been reverted to his substantive position at the end of his period of secondment.

[14] The applicant's distinctly laconic ground of appeal is that K Anderson J "erred in law and in fact in awarding judgment and costs to the [respondent]". But in argument this morning, Mr Gabbidon makes it clear that what the applicant relies on is the fact that, by letter dated 23 February 2007, he was told by the Ministry of Tourism, Entertainment and Culture that approval had been given for him to be assigned duties as Director, Special and Commemorative Events, for a period of six months with effect from 7 February 2017, "until further orders". Then, in a letter written a week later on 1 March 2007, the Permanent Secretary in the Ministry wrote to the applicant again saying:

> "I am directed to inform you that approval has been given for you to be assigned duties as Director, Special and Commemorative Events (SEG 3), with effect from February 7, 2007 until further orders …
>
> **This supersedes memorandum … dated February 23, 2007.**" (Emphasis in the original)

[15] The principal difference between the two letters was that the six-month time period mentioned in the first was omitted from the second, which was said to supersede the first.

[16] In these circumstances, the applicant says that the second letter was intended to convey to him, and was so understood by him, that he had been permanently employed to the position to which he was thus assigned.

[17] Mrs Rowe-Coke observes that in the court below the applicant's case was that he had in fact been seconded to the higher position. That is, she points out, inconsistent with his current contention that he had in fact been permanently appointed to the post.

[18] But, even without that, it seems to us that it is impossible to read either of the two letters in the manner for which the applicant contends. It is quite clear that both letters advised the applicant that he had been "assigned duties" in a post different from his usual post and that it was intended that that assignment would be temporary. Indeed, as both letters indicated, the assignment was "until further orders", a stipulation which would in our view have been wholly inconsistent with permanent employment in the new position.

[19] In these circumstances, it seems to us that if that is the only basis on which it is sought to challenge K Anderson J's judgment, the applicant has failed to demonstrate that he has an appeal with a reasonable prospect of success. It therefore follows that the second application must also be refused.

[20] There will be costs to the respondents on both applications, such costs to be taxed, if not agreed.