[2022] UKPC 58

Privy Council Appeal No 0071 of 2021

JUDGMENT

C-Care (Mauritius) Ltd (Appellant)

v

Employment Relations Tribunal and 5 others (Respondents) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Briggs
Lord Sales
Lord Hamblen
Lord Leggatt
Lord Richards
JUDGMENT GIVEN ON
29 December 2022

Heard on 13 December 2022

Appellant
Maxime Sauzier SC
Shrivan Dabee
(Instructed by ENSafrica (Mauritius))

Respondent (Employment Relations Tribunal)
Aidan Casey KC
(Instructed by RWK Goodman LLP (London))

Co-respondent ((1) Simla Douraka, (3) Kabita Jang, (4) Salah Mohamed Muhawish Al-Janabi, (5) Raja Veerabadren)
Shakeel Mohamed
(Instructed by Dentons LLP (Mauritius))

Co-respondent (2) (Lavishka Makoondlall)
Arvind Hemant Sookhoo
Varoon Saccaram
(Instructed by Etude Ghose (Mauritius))

LORD SALES (with whom Lord Briggs, Lord Hamblen, Lord Leggatt and Lord Richards agree):

1. This is an appeal as of right from a decision of the Supreme Court of Mauritius, which refused the appellant leave to apply for judicial review of a decision of the respondent, the Employment Relations Tribunal (Employment Promotion and Protection Division) ("the Tribunal"), in a dispute between the appellant and the five co-respondents regarding their dismissal. The Supreme Court refused leave on the grounds that the appellant had failed to apply "promptly" to seek judicial review of the decision.

2. Rule 2(4) of the Supreme Court Rules 2000 provides that an application for a prerogative order, that is to say a claim for judicial review, "shall be governed by the practice prevailing for the time being in the Courts of England and Wales". It is common ground that this has the effect of importing the relevant time limit for judicial review claims in England and Wales, and the parties have argued the case on the basis that the relevant rule in England and Wales is that set out in what was RSC (Rules of the Supreme Court) Order 53 rule 4(1). This provided, so far as relevant, that an application to apply for judicial review should "be made promptly and in any event within three months from the date when grounds for the application first arose …". (In fact, the applicable rule in England and Wales at the time these proceedings were brought in 2018 was that contained in Part 54.5 of the Civil Procedure Rules, which had replaced the Rules of the Supreme Court; but it was in the same terms.)

Background to the appeal

3. The co-respondents were employees of the appellant. On 26 September 2017 the appellant informed them that they were being made redundant with effect on 31 October 2017, for economic and structural reasons.

4. The governing legislation then in place (since repealed) was section 39B of the Employment Rights Act 2008. Pursuant to section 39B the co-respondents registered a complaint with the Permanent Secretary of the Ministry of Labour, who in August 2018 referred the matter to the Tribunal. Section 39B(8) provided that once a matter was referred to the Tribunal it should proceed to hear and determine the case within 30 days or, "in exceptional circumstances" (subsection (8)(b)), up to a maximum of 60 days.

5. The parties filed their statements of case and replies during September 2018 and hearings were held on 25 September and 15, 16 and 17 October. In an award dated 26 October 2018 the Tribunal found that there had not been adequate consultation about redundancies and also that the reduction of the appellant's workforce affecting the co-respondents was unjustified. It ordered the appellant to pay them severance allowance. The appellant became aware of the award on the day it was issued.

6. Some six weeks later, on 7 December 2018, the appellant lodged an application before the Supreme Court for leave to apply for judicial review of the Tribunal's

award. The Tribunal and the co-respondents objected to leave being granted on the grounds that the appellant had failed to act promptly to challenge the award and that the application did not disclose an arguable case. The appellant did not file any evidence nor give any explanation why there had been the lapse of time of six weeks before its application was lodged. Instead, counsel for the appellant said that the application was lodged within what he maintained was the normal period of three months.

7. In its judgment delivered on 22 October 2019 the Supreme Court (Madhub and Kwok Yin Siong Yen JJ) refused leave on the sole ground that the application had not been lodged promptly. The court did not find it necessary to examine the merits of the application.

8. The Supreme Court noted (para 9) that the purpose of creating the specialist Employment Promotion and Protection Division of the Tribunal, whose powers include a power to order reinstatement, was to expedite the hearing of disputes in cases of redundancy or the closing down of a business. It continued:

> "10. Bearing in mind the time frame established under section 39B of the Act and the nature of the case this is one of the situations where the court will closely look at the requirement of 'promptness'. The [appellant] was fully aware that one of the grounds of objection was that it had not acted promptly in entering this application. Notwithstanding, it has failed to provide us with any reasons why the application was entered about six weeks after the award came to its knowledge, senior counsel for the [appellant] resting on the fact that the application was entered within the normal delay of three months.
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> 11. Given the state of the evidence before us, we consider that the present application has not been entered promptly, the more so that it is clear that the intention of the legislator in passing the Employment Rights Act 2003, was to ensure that issues arising under this Act are dealt with expeditiously."

9. The appellant appeals to the Board, claiming that the Supreme Court was wrong to hold that the application was not made promptly.

The Board's assessment

10. It is well established, as indeed RSC Order 53 rule 4 says, that there is no fixed time limit of three months for bringing a judicial review claim. The primary requirement is that the claim must be brought "promptly". If an application made within three months does not satisfy this requirement, leave for the claim to be brought is liable to be refused: see, eg, *Mauritius Shipping Corporation Ltd v Employment Relations Tribunal* [2019] UKPC 42; [2020] 1 All ER 844 ("*Mauritius Shipping Corporation*"), para 8.

11. The term "promptly" requires an evaluative judgment to be made by the first instance court, having regard to the particular context and the specific facts of the case. An appellate court will only intervene if the first instance court has misdirected itself or reached a conclusion which it could not rationally reach in the circumstances of the particular case. As stated in *Mauritius Shipping Corporation*, para 12, there is "a high hurdle" for an appellant to surmount when seeking to show that the first instance court has erred in a decision to refuse leave for a judicial review claim to be brought, on the grounds that the application was not made promptly.

12. *Mauritius Shipping Corporation* was, like the present case, concerned with a decision of the Tribunal pursuant to section 39B that the reduction of an employer's workforce on grounds of redundancy was unjustified and that a severance allowance payment should be made to the employees affected. The Supreme Court refused leave to the employer to seek judicial review of the decision on the ground that the claim was not brought promptly. The employer's appeal to the Board was dismissed. The Board stated (para 14) that "it was inevitable that the appellant would face difficulty in persuading the Board to interfere with the conclusions of a local court with superior knowledge of the workings of the employment legislation applicable in this case, of the litigation process in Mauritius, and of the degree of promptness that could properly be expected of a litigant seeking to bring a judicial review challenge in circumstances such as [those in that case]". In other words, when considering whether a local court like the Supreme Court in the present case has reached a decision which is rationally open to it, the Board has regard to the local court's superior knowledge and understanding of local circumstances and the context in which the litigation is taking place.

13. Mr Maxime Sauzier SC, for the appellant, took the Board to a number of authorities which might be taken to suggest that the bringing of a judicial review claim within a period of about six weeks could be regarded as prompt. The Board found these authorities of little assistance. Whether a claim is brought promptly or not depends on the particular circumstances of the specific case. What might be regarded as prompt in certain circumstances does not mean that it will satisfy the requirement of promptness in other circumstances. It is not possible to lay down a bright line time limit applicable across all cases. The drafting of the relevant rule prevents this.

14. The burden to show that a claim has been brought promptly rests on the claimant, since it is the claimant who asserts that it should have leave to bring its claim and the relevant information pertaining to the question whether it has acted promptly will be in its knowledge. This does not mean that the claimant has to adduce evidence about this in every case. It is entitled to wait to see if the defendant raises promptness as an issue. But the claimant has to be prepared to demonstrate that it has brought its claim promptly if it is challenged on that score. If the defendant objects that the claim has not been brought promptly, as the respondent and co-respondents did in this case, the onus will be on the claimant to explain what it has done and that it has acted with the appropriate promptness to be expected in the circumstances.

15. Prejudice or detriment likely to be suffered as a result of delay, either by the defendant public authority or by others affected by a decision by it in their favour, may be a highly relevant factor when considering whether a judicial review claim has been brought with requisite promptness: see, eg, *Maharaj v National Energy Corporation of Trinidad and Tobago* [2019] UKPC 5; [2019] 1 WLR 983, para 37. That is because, if it is likely that delay in bringing proceedings may result in prejudice or detriment to others, there will be a particular reason to expect the claimant to take action quickly. But the requirement of promptness applies in all cases and it cannot be reduced merely to a question of whether there has been prejudice or detriment to another person. It does not follow from the fact that prejudice or detriment is a relevant factor that an absence of prejudice or detriment means that the requirement of promptness is removed.

16. In the present case, the Board is satisfied that the Supreme Court was entitled to conclude that the appellant's judicial review claim had not been brought promptly, and accordingly was entitled to refuse to grant leave for that claim to proceed. The Supreme Court did not misdirect itself and the conclusion it came to was properly open to it.

17. The Supreme Court rightly referred to the speed with which proceedings before the Tribunal under section 37B are required to be conducted and to the legislative intention in enacting this provision of the Employment Rights Act that issues arising under that Act should be dealt with expeditiously. This context is relevant as showing the public interest in Mauritius in ensuring that employment disputes of the kind in issue in this case are resolved speedily. The Supreme Court was entitled to consider that this context was relevant to reasonable expectations about how quickly the appellant should act to commence a judicial review claim to challenge the Tribunal's award.

18. The Supreme Court noted that the appellant became aware of the Tribunal's award the same day it was delivered. Accordingly, the claimant had had ample time in which to consider whether it wished to bring proceedings to challenge the award.

19. In addition, the Board observes that in the circumstances in which the award was produced quickly after the conclusion of the hearing before the Tribunal, the parties and their legal representatives were clearly well aware of the legal issues arising in relation to it. This means that the appellant should have had no difficulty in obtaining legal advice and considering it in order to decide whether to bring a judicial review claim. There is no obvious reason why that should have taken as long as six weeks. The usual time limit in Mauritius for bringing an appeal against the judgment of a court, where the position will be similar, is 21 days: section 37(1)(a) of the District and Intermediate Courts (Civil Jurisdiction) Act 1888. Whilst the Board does not suggest that this time limit applies in relation to judicial review proceedings, it is an indication that if a claimant waits substantially longer than this to challenge what is essentially a judicial determination of the kind produced by the Tribunal it may have to be ready to show that it has in fact acted with promptness.

20. In particular, the Supreme Court was right to rely upon the failure on the part of the claimant to explain by evidence, or at all, what it had done to consider its position in relation to bringing a claim and how it could be said that it had acted promptly in the circumstances, in order to show that it satisfied the promptness requirement. The respondent and co-respondents had distinctly raised the question of lack of promptness as an issue and it was incumbent on the claimant to satisfy the court that it had acted promptly to bring its claim. This the claimant signally failed to do, relying only on the submission that it had acted within the long-stop period of three months as set out in the rule.

21. The Supreme Court did not rely upon prejudice or detriment on the part of the respondent or co-respondents, but as explained above it did not need to do so. However, the Board also notes that the Supreme Court would have been entitled to rely on the fact that, as observed by the Board in *Mauritius Shipping Corporation*, at para 15, "[l]oss of one's employment can give rise to financial hardship of a particularly fundamental nature" and that where, as in both *Mauritius Shipping Corporation* and this case, the awards of monetary compensation made to the co-respondents by the Tribunal would remain unsatisfied pending the judicial review proceedings, account can properly be taken of "the financial hardship that was likely to be caused to [the] co-respondents by delay."

Conclusion

22. For the reasons given above, this appeal is dismissed.