MONTSERRAT

IN THE COURT OF APPEAL

LTAP 2007/003

BETWEEN:

CELESTE O'GARRO

Appellant

and

ROYAL BANK OF CANADA

Respondent

Before:

The Hon. Mr. Denys Barrow, SC — Justice of Appeal
The Hon. Mr. Hugh A. Rawlins — Justice of Appeal
The Hon. Mde. Ola Mae Edwards. — Justice of Appeal [Ag.]

Appearances:

Mr. David S. Brandt for the Appellant
Mr. Kenneth Allen Q.C. for Respondent

2008: April 10;
June16.

Labour tribunal – appeal – s.36(1) Employment Act Cap 15:03 – right of appeal conferred by s.41Employment Act - appeal by way of case stated on point of law – what is the procedure for appealing to the Court of Appeal – CPR 61- whether Notice of Appeal should be struck out since it had not been served on the respondent – CPR 62 –

This respondent applied to strike out the appeal because the notice of appeal that was filed in these proceedings had not been served on the respondent. The appellant had filed a notice of appeal against the decision of the Labour Tribunal established under the Employment Act on a claim brought by the appellant. That Act provided for an appeal on a point of law only by way of case stated from a decision of the tribunal to the Court of Appeal.

Held, striking out the appeal and making no order as to costs:

(1) Part 61 of CPR 2000 provides the procedure for appeals by way of case stated. That procedure begins with a request to the tribunal whose decision is being appealed to state a case. After that request (or an order of the court to state a case, if necessary) is complied with the intending appellant then has to issue a fixed date claim with the

case stated annexed. The appellant must set out, in the claim form or in a statement of case served with it, the appellant's contentions on the question of law to which the case relates.

(2) From these rules it is seen that there is a discrete procedure for appealing by way of case stated and the usual procedure for appealing by filing a notice of appeal does not apply.

(3) The consequence of using the entirely wrong procedure for appealing is that the appellant did not commence proceedings for appealing. Even at this stage no case has been stated and no claim form has been issued.

(4) The submissions that counsel for the appellant made on relief from sanctions addressed only the failure of the appellant to serve the notice of appeal (which is the wrong procedure for appealing in this case) and not the situation that this court's jurisdiction has not been engaged because no appeal had been made.

JUDGMENT

[1] **BARROW, J.A.:** When the captioned appeal came on for hearing counsel for the respondent applied to strike out the notice of appeal because it had not been served on the respondent. It soon became clear that the application raised the issue of how to appeal by way of case stated. Surprisingly, neither counsel addressed the procedure relating to such appeals, which is set out in Part 61 of the **Civil Procedure Rules 2000** (**CPR 2000**).

Background

[2] The appeal was from the decision of the Labour Tribunal, established by section 36(1) of the **Employment Act** (the Act),[1] on a claim brought by the appellant. The appellant was made redundant by the respondent bank, effective 31st January 2006, after twenty five years of service. Section 9 (1) (e) of the Act provides that the minimum notice required to be given by an employer to an employee to terminate the contract of employment where the employee has been continuously employed for thirteen weeks or more shall be not less than eight weeks if the period of continuous employment is fifteen years or more.

[1] Cap. 15:03 of the Laws of Montserrat Revised Edition 2002

[3] Before the Tribunal the appellant contended she was entitled to a minimum notice period of eight months. She argued that the wording of section 9 (1) (e) of the Act was capable of an interpretation to produce that result. After hearing the submissions of counsel for the parties, the tribunal ruled that the minimum period of notice of termination on the ground of redundancy could not be adjusted by the tribunal but was a matter for the legislature or for agreement between employer and employee.

[4] The chairman of the tribunal was the Senior Magistrate. Counsel for the appellant filed a notice of appeal at the magistrate's court office on 5th October 2006. That notice read:

> "IN THE COURT OF APPEAL
> CIVIL APPEAL (TRADE DISPUTE)
> A.D. 2006
>
> Appeal No. T of 2006
> Labour Tribunal Case No: LT 2 of 2006
> Between: CELESTE O'GARRO Appellant
> And: ROYAL BANK OF CANADA Respondent
> Case stated by the Labour Tribunal sitting at Brades on the 20th day of September, 2006.
> Quorum of Tribunal
> Mr. Clifton Warner Senior Magistrate
> Mrs. Claudia Roach Member
> Mr. Julian Romeo Member
>
> NOTICE OF APPEAL
>
> TAKE NOTICE that the Appellant (Being the Appellant in the Court below) hereby appeals to the Court of Appeal against the decision of the Learned Magistrate contained in his reasons for decision dated …, 2006
> The grounds of appeal are as follows:
>
> 1. The decision was erroneous in point of law.
> 2. The judgment was based on a wrong principle or was such that the Court viewing the circumstances reasonably could not properly have so decided.
> 3. Other grounds will follow on receipt of the record.

Dated this 5th day of October, 2006.

Sgd. David S. Brandt
Legal Practitioner for the Appellant"

[5] The notice of appeal was not served on the respondent. When the record of appeal was produced the notice was included in the record.

The right of appeal

[6] It is too well known to merit more than the mere statement that a right of appeal exists only where it is conferred by statute[2] and, necessarily flowing from that, an appeal may be made only in the manner provided. In this case the right of appeal is conferred by Section 41 of the Act, which states:

> "There shall be an appeal, on a point of law only by way of case stated from a decision of the tribunal to the Court of Appeal."

[7] The Act provides no procedure to regulate such appeals but Part 61 of **CPR 2000** does. That part is entitled "Appeals to the Court by way of Case Stated" and declares that it deals with, among other things, the way in which the High Court or the Court of Appeal determines a case stated or a question of law referred to it.

[8] The first portion of Part 61 deals with the procedure for obtaining an order from the court (defined to mean the High Court or the Court of Appeal as required by the particular enactment) to compel a tribunal to state a case. Implicit in this procedure, it would seem to me, is that a party who is dissatisfied by the decision of a tribunal would first request the tribunal to state a case. If the tribunal does not comply with the request the party may apply to the court for an order to compel the tribunal to state a case. If the tribunal complies with the request then there will be no need to apply to the court for an order to compel the tribunal to state a case.

[9] The second portion of Part 61 deals with the procedure for determining a case stated. The premise of this portion of Part 61 is that the tribunal has complied with

[2] Halsbury's Laws of England Vol. 37 Fourth Edition para. 677

the request or order to state a case. The procedure for determining a case stated begins with rule 61.5, which provides that a case stated must be signed by the chairman of the tribunal. The case must be served on all parties to the claim to which the case relates.[3]

[10] Rule 61.6 provides that proceedings to determine a case must be commenced by issuing a fixed date claim in Form 2 (which is contained in the appendix to **CPR 2000**). The claim form may be issued by any party on whom a case was served. If a minister, magistrate, judge of a tribunal, tribunal, arbitrator or other person is entitled by any enactment to state a case or to refer a question of law by way of case stated to the court, that person or tribunal may also issue the claim form. It is clear that an appellant must commence proceedings to determine a case that has been stated by issuing a claim form. Either a party or the tribunal may issue the claim form.

[11] Rule 61.6 provides in paragraph (3) that the claim form must have the case stated annexed and paragraph (4) of that rule provides that the claim form, or a statement of claim issued and served with it, must set out the claimant's contentions on the question of law to which the case relates. Paragraph (5) states that the contentions may be in the form of a skeleton argument. Paragraph (6) states that the court office must fix a date, time and place for the determination of the case. And paragraphs (7) and (8) state that the claim form must be served on all parties to the case to which the claim relates and that it must be served within 14 days after the service of the case stated.

[12] From these rules it will be appreciated that there is a discrete procedure for appealing by way of case stated. The usual procedure for appealing, by filing a notice of appeal, does not apply. That procedure is contained in Part 62. It is beyond doubt that this procedure does not apply to the instant appeal because

[3] Rule 61.5(3) (b). If the case stated relates to a claim brought under the Constitution it must be served on the Attorney General and on all parties to the proceedings to which the case relates; rule 61.5 (3)(a)

rule 62.1 (1) declares that Part 62 does not deal with appeals by way of case stated on a question of law. By filing a notice of appeal against the decision of the Tribunal the appellant used an entirely wrong procedure.

[13] The consequence of using the entirely wrong procedure in **CPR 2000** is that the appellant did not commence proceedings for appealing. The only way to commence proceedings for appealing by way of case stated is by claim form. More fundamentally, even at this stage, the appellant has not requested the tribunal to state a case. On an appeal from the Labour Tribunal this court has jurisdiction only to determine a point of law brought before it by way of case stated. It has jurisdiction only to answer the question or questions of law to which the case relates. It has no jurisdiction to review the merits of the tribunal's decision, which is the usual exercise that the court of appeal conducts. In my view the purported notice of appeal is hopelessly bad and I would strike it out. The submissions that counsel for the appellant made on relief from sanctions addressed only the failure of the appellant to serve the notice of appeal. They did not address the situation, which I have found to be the case, that this court's jurisdiction has not been engaged because no appeal has been made.

[14] Having regard to all the circumstances I would be minded to make no order as to costs. However, if the bank wishes to make representations as to costs, it should be allowed to do so in writing. In that event, I would order the bank to file and serve submissions within 21 days and the appellant to file and serve her submissions in response within 14 days thereafter, for the court to consider without an oral hearing.

Denys Barrow, SC
Justice of Appeal

[1] **EDWARDS, J.A. [AG.]:** This is an Application to Strike Out a Notice of Appeal for failure to serve the Notice of Appeal on the respondent/applicant.

[2] The application raises novel issues of procedure under Parts 61 and 62 of the **Civil Procedure Rules 2000** which were not addressed by Counsel for the parties at the hearing. These issues arise because the Notice of Appeal was made in the case of an appeal by way of case stated on point of law from the decision of the Labour Tribunal established by section 36(1) of the **Employment Act Cap. 15:03** of the Laws of Montserrat Revised Edition 2002 (the Act). The issues are: (1) What is the procedure for appealing to the Court of Appeal by way of case stated on a question of law in the case of an appeal from a tribunal? (2)What is the effect of failing to serve the notice of appeal on the respondent in light of the procedure under Part 61 of **CPR 2000**?

Background Facts

[3] The appellant was the compliance officer in the respondent bank from September 2003 to January 2006. On the 26th June 2005 the respondent informed the appellant by letter that she was being made redundant effective 31st January 2006. She had been employed by the respondent in 1980 and worked for an unbroken period of 25 years before her redundancy.

[4] Section 9 (1) (e) of the Act states that " the minimum notice required to be given by an employer to an employee to terminate the contract of employment where the employee has been continuously employed for thirteen weeks or more shall be - ...(e) not less than eight weeks if the period of continuous employment is fifteen years or more."

[5] The appellant made an application to the Tribunal on the 5th July 2006 in which she contended that she was entitled to a minimum notice period of 8 months because the words of section 9 (1) (e) of the Act are ambiguous; and may be interpreted by the Tribunal to mean that depending on the number of years the employee works with the employer the minimum notice period should be increased. The appellant relied on the case **Clarke v American Life Insurance Co. (2002)**[4] to support her contention. The tribunal made the following order after hearing the submissions of learned counsel Mr. Brandt and Queen's Counsel Mr Allen:

> "Tribunal has decided that the minimum period of notice re: redundancy cannot be adjusted by this body but by Parliament (Executive Council) or by the employer as part of the contract of employment between itself and employee."

[6] Section 41 of the Act states: "There shall be an appeal, on point of law only by way of case stated from a decision of the tribunal to the Court of Appeal." The Act is silent as to how the appeal is to be made. The Chairman of the tribunal was Senior Magistrate Mr. Clifton Warner. The appellant's legal practitioner filed the following document in the Magistrate's Court Office on the 5th October 2006 to set in motion the appeal process:

> " **IN THE COURT OF APPEAL**
> **CIVIL APPEAL (TRADE DISPUTE)**
> **A.D. 2006**
> Appeal No. T of 2006
> Labour Tribunal Case No: LT 2 of 2006
> Between: CELESTE O'GARRO Appellant
> And: ROYAL BANK OF CANADA Respondent
> Case stated by the Labour Tribunal sitting at Brades on the 20th day of September, 2006.
> **Quorum of Tribunal**
> Mr Clifton Warner Senior Magistrate
> Mrs Claudia Roach Member
> Mr Julian Romeo Member

[4] (2002) 62 WIR 1

NOTICE OF APPEAL

TAKE NOTICE that the Appellant (Being the Appellant in the Court below) hereby appeals to the Court of Appeal against the decision of the Learned Magistrate contained in his reasons for decision dated …, 2006
The grounds of appeal are as follows:

4. The decision was erroneous in point of law.
5. The judgment was based on a wrong principle or was such that the Court viewing the circumstances reasonably could not properly have so decided.
6. Other grounds will follow on receipt of the record.

Dated this 5th day of October, 2006.

Sgd. David S. Brandt
Legal Practitioner for the Appellant"

[7] This notice of appeal apparently remained in the Magistrate's Court Office for over eight months without being served on the respondent. It was subsequently transmitted to the High Court Registrar's Office in Montserrat on the 21st June 2007 when the notice of appeal was filed, as part of the record (page 4). This record reached the Court of Appeal on the 4th September 2007.

[8] By notice dated 4th September 2007 the Deputy Chief Registrar informed the legal practitioners for the parties that the appeal would be heard in Montserrat on the 12th November 2007. The affidavit of Mr. Yuri Lazaar filed on the 18th September 2007, in support of the respondent's application to strike out the notice of appeal, shows that neither the respondent nor their legal practitioner was aware of the appeal until the 5th September 2007 when the Deputy Chief Registrar's notice of hearing was served by the court. On the 18th September 2007 the respondent filed the Application to strike out the appeal. It was served on the 19th September 2007. The hearing of the application and the appeal were rescheduled for the 10th April 2007 by a case management order dated 20th November 2007.

[9] Although the appellant had made no application for extension of time to serve the Notice of Appeal after the respondent's application to strike out the appeal had been served on her, at the hearing we were informed by learned counsel Mr.

Brandt that on the 4th April 2008 it was served on the respondent without the leave of the Court.

Submissions

[10] Learned Queen's Counsel Mr Allen submitted that there is no appeal before the court where the appellant fails to serve the notice of appeal on the respondent in a timely manner; that the appeal should be struck out; and that the court ought not to grant an extension of time to serve the notice of appeal 18 months after the notice of appeal was filed. Significantly, the affidavits in support of the respondent's application do not allege that the respondent has suffered any prejudice as a result of the appellant's default. Queen's Counsel Mr. Allen attempted to address this by way of submissions and of course he was prevented from doing so by the court.

[11] Learned counsel Mr. Brandt focused his submissions on the absence of a provision in Part 62 as to who should serve the notice of appeal and the time within which it must be served. Mr. Brandt referred to the repealed Civil Procedure Rules 1970 Order 64.7 (2) which required that "A true copy of the notice [of appeal] shall be served upon the respondent within seven days after the original notice has been filed". Mr. Brandt contended that the **Civil Procedure Rules 2000** do not require the notice of appeal to be served within any specific time; that the Rules are unclear as to who must serve the notice of appeal; and that it appears that it ought to have been served by the court.

The Rules Relating to Service of Notices of Appeal

[12] It must be borne in mind that the **Court of Appeal Rules 1968** co-exist with, and have not been repealed by the **CPR 2000**. Rule 15 (2) of the 1968 Rules also states that "A true copy of the notice [of appeal] shall be served upon the respondent **within seven days after the original notice has been filed."**

[13] CPR 62.7 states that the notice of appeal must be served on all parties to the proceedings, and refers to Part 6 which deals with service of documents other than claim forms. Since a notice of appeal is not a judgment or order governed by CPR 6.1 (1) or (2), the companion rule which seems to apply to the serving of notices of appeal generally is CPR 6.1(3) which states: "Any other document must be served by a party, unless – (a) a rule otherwise provides; or (b) the court orders otherwise." I must note also that CPR 62.9 which stipulates the actions that the court must take on receipt of a notice of appeal, does not require the appropriate court office to serve the notice of appeal on the respondent. In my view it follows quite logically from CPR 6.1 (3) and CPR 62.9 that "the party" who must serve a notice of the appeal is "the party" who generated and filed that document. These rules do not expressly state the consequences of failing to serve a notice of appeal in a timely manner or at all, but the court undoubtedly has power to strike out an unserved notice of appeal in the absence of an application to extend the time for service and/ or an application for relief from sanction.[5]

Appeals from Tribunals Under CPR 2000

[14] The submissions of both Counsels show no recognition of the fact that under the **Civil Procedure Rules 2000**, the process for appealing from the decisions of tribunals differs, depending on whether the parent enactment gives a right of appeal generally, or whether it provides only for an appeal by way of case stated on a point of law.

[5] CPR 62.20 states: " In relation to an appeal the Court of Appeal has all the powers and duties of the High Court including in particular the powers set out in Part 26." CPR 62.14 (1) states: " Parts 25 to 27 so far as relevant apply to management of an appeal case as they do to case management of a trial." CPR 26.3 provides that : "In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that- (a) there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings". See also: **Michael Baptiste and Yoland Bain-Joseph;** Civil Appeal HCVP 2006/026 (Grenada) , 7th February 2008,(Single Judge Edwards J..A. (Ag.) at paragraphs 8 to 9.

[15] CPR 62.1(1) states that Part 62 "deals with appeals to the Court of Appeal from – (b) a tribunal ;...not being (i) appeals by way of case stated on a question of law for determination by the court; nor (ii) appeals or applications to the court for which other provision is made by these Rules." It is emphasised at the end of this rule that Part 61 deals with appeals to the court by way of case stated. CPR 61.1(1) also states that Part 61 "deals with the way in which the...Court of Appeal determines a – (i) case stated; or (ii) question of law; referred to it, by ... a tribunal..."

[16] The other process relating to general appeals from tribunals is governed by CPR 62.3 (b) (ii) which states: "An appeal is made – (b) in the case of an appeal from (ii) a tribunal, by filing a notice of appeal at the office of the Court of Appeal and takes effect on the day that it is received at the appropriate court office. It appears that this is probably the process that Counsel Mr Brandt had in mind when he filed the notice of appeal in the Magistrate's Court office although he required the tribunal to state a case on point of law. CPR 62.9 provides that:

> "Upon the notice of appeal being filed …the appropriate court office must forthwith if the appeal is –
> … (c) from a … tribunal – apply to the clerk or other officer of the tribunal for a –
> (i) certified copy of the record of proceedings;
> (ii) certified copy of the notes of evidence given; and
> (iii) statement of the judgment, the reasons for the decision and any finding on any question of law under appeal;
> and forthwith upon receipt of these documents give notice to all parties that copies of the record and other documents are available on payment of the prescribed fee."

Under this process it appears that failure to serve the notice of appeal would not be fatal to the appeal as Queen's Counsel Mr. Allen contended. It would be an irregularity and not a nullity, having regard to CPR 62.3 (b)(ii), since the appeal would have already taken effect on the 5th October 2006. The failure to serve would be an irregularity, subject to any sanction provided by the rules, practice direction, or order of the court, and/or the court's discretion to extend the time for service.

[17] Having regard to CPR 62.1(1) and CPR 61.1 (1) I am of the view that Part 62 of the **Civil Procedure Rules 2000** is irrelevant to the present appeal. This is an appeal from a tribunal by way of case stated on point of law, clearly governed by Part 61. The consequences of the appellant's failure to serve the notice of appeal on the respondent within seven days after the original notice was filed must therefore be considered in the context of the proper procedure that should have been followed.

Procedure Governing Appeals By Way of Case State

[18] Part 61 covers the procedure to be followed where the tribunal refuses to sate a case, and the procedure to be followed by any party on whom a case stated has been served where that party wishes the Court of Appeal to determine the case. In either case a fixed date claim must be filed and served. CPR 61.5 (1) and (3) require that a case stated by a tribunal be signed by the Chairman of the tribunal and the case must be served on all the parties to the claim (proceedings) to which the case relates. Though the rules do not clearly state who must serve the case stated, in my view the tone of CPR 61.5 strongly suggests that it is the tribunal who must cause it to be served on the party at whose instance a case has been stated and the other parties to the proceedings.

[19] CPR 61 .6 stipulates that the appeal by way of case stated must commence as follows:

> "61.6 (1) Proceedings to determine a case must be commenced issuing a fixed date claim in Form 2.
> (2) The claim form may be issued by-
> (a) any party on whom a case was served under 61.5(3); or
> (b) if a … tribunal … is entitled by any enactment to state a case or to refer a question of law by way of case stated to the Court - that … tribunal."

[20] CPR 61.7 (1) requires the claimant to file a copy of the proceedings to which the case relates not less that 7 days before the date fixed to determine the case.

The Request for a Case to be Stated

[21] It is difficult to reconcile this procedure under Part 61 of the **Civil Procedure Rules 2000** with the procedure that the appellant and the Labour Tribunal utilised in bringing this appeal before this court. It would seem, having regard to Part 61 that the document described as a notice of appeal ought to be regarded as merely the appellant's request that the Labour tribunal state a case, since it triggered the tribunal to state the facts and give reasons for its decision. However the tribunal has not posed any questions for the consideration of the court which is essential in an appeal by way of case stated.

[22] Even if it were thought that the Notice of Appeal could be treated as the fixed date claim form the 6 months limited for its service under CPR 8.12 (1) would have expired in April 2007 if the date of issue is taken to be the date it was filed in the Magistrate's Court. Were the date of issue taken to be when it was filed in the High Court Registry (which is 21st June 2007), its validity also would have expired in December 2007 before service was effected on the respondent.

[23] In the foregoing premises, it is my view, first that there is no appeal before this court because of the appellant's failure to adhere to the requirements of section 41 of the Employment Act. I am further of the view that in any event the appeal would have been wholly defective for failure to comply with the requirements for service. The result, in my view, is that the appeal should be struck out. I agree with the direction that my brother Barrow JA proposes in relation to costs.

Ola Mae Edwards
Justice of Appeal [Ag.]

[1] **RAWLINS J.A:** have had the benefit of reading the judgments delivered in this case by my learned colleagues Barrow JA and Edwards JA (Ag). I agree with their decisions and order and directions which they propose. Accordingly the appeal is struck out and no order as to costs is made. In the event however that the respondent bank wishes to make representations on the issue of costs, the bank shall file and serve written submissions within 21 days of the date of the delivery of this judgment and the appellant Celeste O'Garro shall file and serve written submissions in response within 14 days of the service of the bank's submissions. The Court shall, in that event consider the issue of costs without an oral hearing.

Hugh A. Rawlins
Justice of Appeal