

Employees have increased bargaining power after ruling, says law firm



Puisne Judge Charles-Etta Simmons

by Rebecca Zuill

Employees now have increased bargaining powers, Appleby lawyers Kiernan Bell, Michael Hanson and Henry Tucker stated in an e-alert sent out by the law firm.

The lawyers were describing the impact of a Supreme Court judgement in a case between Janice Fleming, a former employee at Flanagan's Irish Pub and Restaurant, and Government's Director of Labour and Training.

Ms Fleming was represented by Mr Tucker for the August 16 hearing, which was an application for judicial review after an employment inspector refused to refer her complaints to the Employment Tribunal.

Puisne Judge Charles-Etta Simmons who heard the case, ruled in favour of Ms Fleming.

Appleby's e-alert states reads: "The Supreme Court of Bermuda (the Court) has handed down a landmark labour judgment with immediate ramifications for employers dealing with employee complaints under the Employment Act 2000 (the Act). The overall effect of this decision is expected to increase the bargaining power of employees in any complaints brought under the Act.

"In Janice Fleming vs the Director of Labour and Training [2013] SC (Bda) Civ (18 December 2013), the Court held that when a complaint brought under the Act is not settled by conciliation, an Employment Inspector must refer the complaint to the Employment Tribunal if the facts alleged in any complaint would, if proven, give the employee some chance of success before the Employment Tribunal."

Mrs Simmons had written in her judgement, which was released in December: "The main question arising for determination in this Judicial Review application is what is the threshold test to be applied by the Employment Inspector in order to satisfy himself that he has reasonable grounds for believing that an employer has failed to comply with a provision of the Act."

She noted: "Mr Tucker for the Applicant points out that this case marks the first time since the Act came in to force that the court must consider the role of the Employment Inspector appointed under Section 34 of the (Employment) Act."

Mrs Simmons said that the legislation "reveal(s) the clear intention of Parliament that an aggrieved employee has recourse to the Tribunal in every case where the Employment Inspector is unable to achieve resolution of a complaint by way of conciliation."

She stated: "In the event that the Applicant cannot succeed on her primary case the Applicant's case in the alternative is that if the Inspector is entitled to reject a case and not refer it to the Tribunal, then the test set out in Section 37 (4) of the Act requiring "reasonable grounds to believe" can be no higher than the threshold test engaged in an application such as that to strike out a Statement of Claim in the Supreme Court pursuant to Order 18 rule 19."

Section 37.4 reads: "Where the inspector —

"(a) has reasonable grounds to believe that an employer has failed to comply with any provision of this Act; but

"(b) is unable to effect a settlement under subsection, he shall refer the complaint to the Tribunal."

while Order 18, rule 19 states:

"Striking out pleading and indorsements

19 1 The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that—

(a) it discloses no reasonable cause of action or defence, as the case may be;

or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

Mrs Simmons' judgement continues: "I find as fact and law that the Employment Inspector failed to appreciate the nature of his function and role as an inspector and conciliator. His decisions in the instances referred to above were tainted with considerations made outside the established

procedure of the Act as I have found it to be, and in violation of the Applicant's Constitutional right to be heard by an independent tribunal."

The Appleby lawyers pointed out: "The ruling also contains detailed guidance on the role of the Employment Inspector which will be significant for any employer responding to complaints made under the Act.

"In addition, there will be significantly reduced scope for an employer to seek rejection of an employee complaint before the matter is referred to the Employment Tribunal. This will require employers to form a view on the merits of an employee's complaint at an earlier stage, in order to accommodate the near inevitability that a complaint will reach the Employment Tribunal if it is not settled at the conciliation stage."

Useful websites: http://www.gov.bm/portal/erver.pt/gateway/PTARGS_0_2_10809_204_226633_43/http%3B/ptpublisher.gov.bm%3B7087/publishedcontent/publish/non_ministerial/judiciary/judgments_2013/fleming_v_labour_and_training.pdf

<http://www.bermudalaws.bm/Laws/Annual%20Laws/2000/Acts/Employment%20Act%202000.pdf>

<http://www.mondaq.com/x/285370/employee+rights+labour+relations/Bermuda+labour+judgment+employees+have+increased+bargaining+power>

<http://www.bermudalaws.bm/Laws/Consolidated%20Laws/Rules%20of%20the%20Supreme%20Court%201985.pdf>