THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Port of Spain

Claim No. CV 2020-02557

IN THE MATTER OF SECTION 62(1) OF THE NATIONAL INSURANCE ACT CHAP 32:01

AND

IN THE MATTER OF THE APPEAL OF THE DECISION OF THE NATIONAL INSURANCE BOARD

AND

IN THE MATTER OF THE APPEAL OF THE NATIONAL INSURANCE APPEAL TRIBUNAL

Between

Bhadase Seetahal-Maraj

Claimant

And

The National Insurance Board of Trinidad and Tobago

Respondent

Before the Honourable Madam Justice Eleanor Joye Donaldson-Honeywell

Delivered on: 2 March 2021

Appearances

Anil V. Maraj and Khalid Hassanali , Attorneys at Law for the Claimant

Susan Moolchan and Leela Rajkumar , Attorneys at Law for the Respondent

Ruling

A. Introduction

1. This is a determination of an application for extension of time for the filing of the present Claim. The Claim is an appeal against a decision of the Respondent to disallow the Claimant's application for a disablement grant. Appeals of this kind are governed by Part 60 of the **Civil Proceeding Rules 1998**, as amended ("the CPR") and Section 62 of the **National Insurance Act Chap 32:01** ("the Act").

2. According to the CPR, a claimant must file their appeal 28 days after notice of the respondent decision. It is admitted by the Claimant that the present appeal was filed one year and several months outside of the deadline. It is on this basis that the Claimant's application is opposed. However, the Claimant's case is that their first appeal to the Board, which concluded in July 2020, as well as delay by the Respondent and COVID-19 restrictions contributed to this lapse of time and provides a good explanation for the delay; and further, that the extension should be granted as there is a realistic prospect of success on the Claim. The time that elapsed from conclusion of the Appeal to the Board to the filing of the Appeal to the Court was 38 days i.e., just 10 days over the prescribed time.

B. Issue

The issue in the present case is therefore whether the Claimant ought to be granted an extension of time for the filing of this Claim/appeal.

C. Factual Background

3. The Claimant is the former Dean at the National Energy Skills Center. He is now retired but during the period of his employment he was registered for national insurance and is

therefore entitled to certain benefits under the Act, including employment injury benefits.

4. On 1 July 2016, the Claimant was injured during a rehearsal for a jobs fair at the Point Lisas Campus. The jobs fair committee appointed by the President of NESC was responsible for planning the fair. As part of a planned demonstration, the Claimant was to ride a motorcycle on stage towards a microphone to deliver the feature address. While conducting a test drive on the motorcycle, the Claimant collided with a motor vehicle and received serious injuries including a fractured left wrist.

5. The Claimant paid for the damage to the motorcycle and the motor vehicle and it was agreed in writing by the President of the NESC on 31 October 2016 that these sums would be refunded. This refund was received by the Claimant and thereafter, he applied to the Respondent for a disablement grant on 4 July 2017.

6. Receiving no response from the Respondent for over a year, the Claimant sent a pre-action letter dated 18 October 2018. This letter set out the Claimant's numerous attempts to get a response from the Respondent on his application. The Respondent responded via letter dated 23 October that it had not yet obtained all relevant information to comprehensively address the issues, and invited disclosure of additional information from the Claimant regarding his Claim.

7. The Respondent, thereafter, sent a letter dated 7 November 2018 indicating that it had conducted an expedited investigation. The Respondent determined, citing Section 10(2) of the National Insurance (Benefits) Regulations, that the Claimant's job description did not speak to the act of controlling and or operating and or managing a motorcycle in the execution of his duties as Dean and therefore that the Claimant had been acting beyond the scope of his job description. The Claimant was therefore disallowed from receiving the disablement benefit.

8. The Respondent also indicated in this letter that it became aware of an undated NESC accident report into the 1 July 2016 incident which alluded to the fact that the Applicant did not have the requisite permissions or permits to operate the motorcycle. In the undated report attached to the Claimant's affidavit, the following recommendations are made and are said to be "resulting from the incident":

> *"1) All vehicles coming on site must have a valid insurance*
> *2) All personnel operating any vehicle on site must be in possession of the relevant permit to drive, ride or operate the vehicle.*
> *3) Any agreement between an employee and the owner of any vehicle coming on site (at any campus), with a view of the employee operating that vehicle, must be documented in writing and formalized."*

9. The Claimant has attached a letter from the HSSE Manager of NESC indicating that the policies indicated in the undated report did not exist when the 1 July 2016 incident occurred.

10. The Claimant alleges that the Respondent's decision was based on insufficient evidence and failed to seek comment from the Claimant in respect of these documents. The Claimant responded to the Respondent by letter dated 13 November 2018 setting out the facts surrounding the job fair and the incident and challenging the use of the undated report and its recommendations. In this letter, the Claimant's attorneys, though referring to statute and case law, state their position that "whether an accident arose out of and in the course of one's employment is a question of fact".

11. By letter dated 2 December 2018, the Respondent accepted that the undated report was prospective but that the Respondent was relying on the maxim of *res ipsa loquitur*. They reaffirmed their decision and concluded that the injury occurred in circumstances that were not reasonably incidental to, consequential upon or ancillary to his job as Dean.

12. The Claimant thereafter filed an appeal to the Appeals Tribunal on 15 February 2019. The hearing of the appeal was held on 14 October 2019 and the decision of the Tribunal was received by the Claimant on 14 July 2020. The Appeals Tribunal disallowed the appeal on the basis that it lacked jurisdiction to determine the dispute as it involved a mixed question of fact and law. According to the Act, appeals on questions of fact alone ought to be made to the Appeals Tribunals, while appeals on mixed law and fact must be made to the High Court of Trinidad and Tobago – Section 62(1).

13. The Claimant filed the present Claim on 21 August 2020, just over one month after receiving the Tribunal's decision. Due to the CPR provision at Part 60.5 that appeals ought to be filed within 28 days from notice of decision, the Claimant applied on 26 August 2020 for an extension of time to file its Claim. The Defendant then filed an affidavit in opposition to the Claimant's application on 4 November 2020.

D. Evidence

14. The evidence filed by the parties relevant to the present application are contained in:
    a. The Claimant's Notice of Application for extension of time and supporting Affidavit of Khalid Hassanali, the Claimant's instructing Attorney at Law, filed 28 August 2020; and
    b. Affidavit of Lindsay Webb, a Legal Officer employed with the Respondent, filed on 4 November 2020 in opposition to the Claimant's Notice of Application.

E. Law and Analysis

15. **Section 62 of the Act** governs the procedure for filing Appeals from decisions of the Board:

    "62(1) Appeals from decisions of the Board shall lie to the Appeals Tribunal on questions of fact only and to the High Court on questions of law or partly of law and partly of fact and from the High Court to the Court of Appeal.

    …

(3) Provision shall be made by Rules of Court for regulating appeals to the High Court and the Court of Appeal and for limiting the time within which such appeals may be brought."

16. **Part 60.5 of the CPR** states:

"Time within which claim form must be served

60.5 The claim form and statement of case must be served within 28 days of the date on which notice of the decision was given to the claimant."

17. The Claimant submits that Part 60.5 does not set out any express sanction for failure to file within 28 days and therefore the court's discretion is wider and ought to be exercised to give effect to the overriding objective – **Samaroo v Inshan Ishmael CA 381/2019**. Citing **Roland James v AG CA 44/2014** the Claimant suggests that the factors outlined in **Part 26.7 CPR** should be considered. **Part 26.7(1), (3) & (4)** of the CPR provides:

"(1) An application for relief from any sanction imposed for a failure to comply with any rule, court order or direction must be made promptly

...

(3) The court may grant relief only if it is satisfied that—

(a) the failure to comply was not intentional;

(b) there is a good explanation for the breach; and

(c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.

(4) In considering whether to grant relief, the court must have regard to—

(a) the interests of the administration of justice;

(b) whether the failure to comply was due to the party or his attorney;

(c) whether the failure to comply has been or can be remedied within a reasonable time; and

(d) whether the trial date or any likely trial date can still be met if relief is granted."

19. The Respondent also submits that the relevant test as set out in **Roland James** is applicable, but highlights that the court is not engaged in a rubber-stamping exercise and that there is a need for compliance with the rules even where no sanction is imposed.

Promptitude/good explanation for the delay

20. The Court of Appeal in **Rawti Roopnarine v Harripersad Kissoon Civ App 52 of 2012**, considering what qualifies as a good explanation, said at paragraph 33:

> *"33. An explanation therefore that connotes real or substantial fault on the part of the person seeking relief cannot amount to a good explanation for the breach. On the other hand a good explanation does not mean the complete absence of fault. It must at least render the breach excusable. As the Court of Appeal observed in Regis, supra, what is required is a good explanation not an infallible one. When considering the explanation for the breach it must not therefore be subjected to such scrutiny so as to require a standard of perfection"*

21. The Claimant submits that there was assiduous pursuit of this matter from inception. Counsel for the Claimant refers to the pre-action letter sent before determination of the Claimant's application by the Board, the filing of the first appeal at the Appeals Tribunal and finally the prompt seeking of representation to pursue the appeal in this court upon learning of Tribunal's determination. The Claimant's submission is that the time spent at the Appeals Tribunal ought not to be counted against the Claimant as he was acting on legal advice and continuously pursued his legal rights. Counsel for the Claimant submits also that it would not have been procedurally appropriate for the Claimant to file a simultaneous Appeal to the High Court.

22. The Respondent, on the other hand, points out that the filing of the present appeal was in fact some 38 days after the Tribunal's determination. This amounts to a failure to file this appeal even within 28 days of the Appeals Tribunal's decision. The Claimant's

argument on this point is that these three weeks were spent seeking representation and preparing instructions and documents. The Claimant also cites the COVID-19 restrictions which reduced office hours at NESC and hampered the receipt of instructions.

23. The Respondent also challenges that the filing of the first appeal sufficiently explains the Claimant's delay. The Respondent cites the **Eastern Caribbean Supreme Court decision of Patrick Morille v Hermina Roseline Morille SLUHVAP 2010/0035** in which the court considered that the applicant's delay in pursuit of an appeal to the High Court was not sufficiently explained by a prior "mis-step" in initiating judicial review proceedings:

> *"the appellant made a deliberate decision to pursue judicial review rather than avail himself of the relief available under the Act of appealing to the High Court. No exceptional circumstances have been advanced to warrant the court exercising its discretion in favour of extending time to appeal."*

24. The Respondent submits that the Claimant's Attorneys had always held the view from as far back as the date when the Respondent made the challenged decision that mixed issues of fact and law were involved. Accordingly, the Respondent argues, it was an error by the said Attorneys to proceed to the Appeals Tribunal instead of to the Court. They submit, at great length, that the error of an attorney is not a good reason for delay as the delay is based on breach of the rules.

25. The Claimant does not admit, however, that the filing of the first appeal in the Appeals Tribunal was an error. It is the Claimant's submission that the challenge could have been resolved purely on the facts, and that it was only during the hearing that the Appeals Tribunal concluded that its jurisdiction was ousted. The Claimant submits in his reply submissions that the Tribunal wrongly accepted the submission of the Respondent at the date of the hearing, that the issue was one of mixed fact and law. Further, it is submitted that the factual basis of the Respondent's decision was never explored by the Tribunal.

26. As argued by the Claimant in reply submissions, the court in **Morille** was considering a different set of circumstances, not analogous to the present case. A judicial review claim was first pursued in that case and then abandoned by the Claimant before commencing the Appeal. In the present case, it is the ruling of the Tribunal after the Claimant legitimately pursued a course of appeal set out in the Act that determined the initial appeal. This left the Claimant with no alternative recourse but to the High Court. There were no "mis-steps" as was the case in the **Morille** case.

27. The Claimant submits that missing the deadline to file the appeal was unintentional especially since the Claimant has consistently demonstrated his intention to challenge the Respondent's decision. It is suggested that the majority of the delay was spent bringing the matter before the Appeals Tribunal and not any lack of diligence by the Claimant in approaching the courts.

28. Considering all the facts set out above, it is my opinion that the Claimant indeed pursued his legal rights assiduously and without significant delay. The Respondent's assertion that the Claimant's first appeal was a "mis-step" or error on the part of the Claimant's attorneys is not supported by the evidence before the court. The decision of the Respondent was based on a determination of the facts and therefore it was reasonable for the Claimant to pursue his rights before the Appeals Tribunal before coming to the High Court.

29. After determination of that appeal, the Claimant's delay in bringing his Claim was not significant and his explanation that there were delays in accessing information due to COVID-19 restrictions is reasonable. The Claimant also promptly applied for an extension of time days after the filing of the Claim, prior to any objection by the Respondent.

Realistic Prospect of Success

30. The Claimant submits that he has a realistic prospect of success in this appeal against the merits and procedural fairness of the Respondent's decision. The Claimant's case is that

the injury occurred during his employment; that he was injured rehearsing his entrance for the jobs fair planned to attract potential employers of the trainees; that his job included providing opportunities to connect trainees with employers in the industry; and that attracting as many employers as possible to the jobs fair served that goal. The Claimant's case therefore is that his access to the motorcycle, rehearsal space, planning and other resources is a direct result of his employment.

31. The Claimant suggests that the evidence of Hassanali as to what was involved in the course the Claimant's employment ought to be preferred. It is submitted that this evidence contains practical experience directly from the Claimant about his work at NESC.

32. The Respondent's position, set out in the affidavit of Lindsay Webb, is that at the time of the Claimant's injury he was not conducting an act that he was employed to perform or that was reasonably incidental to his job duties. They deny that the letter from the President of the NESC and the cheque payment are evidence that the NESC considered the accident as arising out of or in the course of the Claimant's employment.

33. With regard to the procedural fairness in the decision-making process, the Webb affidavit states that the Applicant was given an opportunity to make representations and cites the following words of the Respondent's letter dated 23 October 2018:

> *"if there be any additional information from your client regarding his claim we encourage that the disclosure/exchange of such information be made to the undersigned at an early time with the overriding objective of ventilating this prospective legal claim"*

34. The Respondent, in reply submissions, argues that it is inappropriate to consider the merits of the case at this stage. They cite the dicta of Mendonça J.A. at para. 25 of the **Roland James** decision:

> *"So far as the merits of the defence are concerned the applicant is not required to establish that he has a good defence or for that matter to outline the merits of the*

defence. However, where, as in this case, the defendant has put before the Court the proposed defence and the other side wishes to argue the merits of the defence as influencing the outcome of the application for an extension of time, it may not be appropriate for the Court to entertain such an argument unless the claimant has given reasonable notice to the defendant that he intends to so argue."

35. However, this dicta from **Roland James** is stated in relation to submissions on the merits made by the party that is opposing the application. It is noteworthy that the Court of Appeal does appear to make very brief comment/consideration of the merits of the applicant's defence at para. 50, determining that no argument could have been advanced that the defence had no realistic prospect of success:

    "With respect to merits of the defence, the claimant did not in his submissions raise any issue regarding the merits of the proposed defence. I believe the claimant was well advised to do so as it cannot be successfully contended that the defence does not disclose grounds for defending the claim and should be struck out or that the defendant has no realistic prospect of success so that the claimant should be granted summary judgment."

36. Without delving into the prospects of success of the Claim, it can be observed that there is a real dispute between the parties as to whether the incident that caused the Claimant's injury arose out of the course of his employment. The facts surrounding the incident have not yet been contradicted by evidence from the Respondent and as stated by the Claimant, the Appeals Tribunal did not consider the substance of the Claimant's appeal. Therefore, a determination on this point still falls to be considered.

37. Further, there are issues relating to the weight and consideration of the undated report by the Board and whether the letter from the Respondent inviting additional information from the Claimant can be considered a true opportunity to be heard.

Other factors

38. The Claimant also sets out in submissions other relevant factors to be considered. These include:
    a. the fact that trial dates and hearings have not yet been set;
    b. there are no facts in dispute in this appeal as it is centered around legal construction of the phrase "accidents arising out of and in the course of employment"; and
    c. the consequence of dismissing the application is disproportionate to the Claimant's non-compliance with the CPR rule and will leave the Claimant without recourse to access the disablement benefit.

39. In considering the interest of the administration of justice, the Respondent asks the court to take judicial notice of the Minister of Finance's address on the National Budget for the Fiscal Year 2021, in particular the statement that expenditure on benefits was now exceeding contribution income. This, the Respondent contends, should be weighed in the court's decision against setting a precedent for the grant of extensions of time that are significantly out of time.

40. The Respondent also submits it will be prejudiced by the grant of the extension in that it would be forced to expend further costs in litigating the matter. The Claimant in reply submissions objects to the court taking judicial notice of these statements, submitting that this should have been adduced through formal evidence. In support, Halsbury's Laws of England Volume 12 (2015) is cited as guidance to the Court to be cautious in accepting these statements the full context of which has not been properly brought before the court.

F. <u>Conclusion</u>

41. The present case requires a largely factual determination of whether an incident arose out of the Claimant's employment. The Claimant cannot be faulted for pursuing an appeal

to the Appeals Tribunal in these circumstances. Despite the determination of the Tribunal in this case, there would be a significant miscarriage of justice to deny the Claimant the opportunity to have his appeal heard. There is no question in the present case of a pervasive "old lax culture" as was warned against in Roland James. The Claimant has been looking after his legal rights from the inception of his application to the Board.

42. In conclusion, the Claimant's delay in bringing the present Claim can be viewed as excluding the time spent pursuing his appeal at the Appeals Tribunal. This was a legitimate exercise of the Claimant's rights under the Act and demonstrated a genuine attempt to appeal to the Tribunal for a factual determination on his application.

43. The time between receipt of the Tribunal's determination and the filing of this Claim does not represent a significant delay by the Claimant. It is a mere 10 days beyond the prescribed 28 days. This part of the delay is adequately explained by the Claimant's inability to obtain full instructions due to the COVID-19 restrictions. The Claimant has provided a good explanation for the delay and has also demonstrated sufficient promptitude.

44. A real dispute exists between the parties. There has been a failure by the Respondent to prove any significant prejudice should time be extended. The breach was unintentional. These are all considered as relevant factors in the determination of this application.

45. Considering all the factors outlined above, the overriding objective in treating cases justly lies in favour of the Claimant being allowed to challenge the merits of the Respondent's decision.

G. Order

46. The Court therefore grants the Claimant's application for extension of time to file the present Claim.

47. The Defendant is directed to pay the costs of the Claimant's Application in an amount to be assessed if not agreed.

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Eleanor Joye Donaldson-Honeywell
Judge