

SAINT LUCIA

IN THE COURT OF APPEAL

HCVAP 2008/018

BETWEEN:

HUGGINS NEAL NICHOLAS

Appellant

and

[1] ATTORNEY GENERAL

[2] THE TEACHING SERVICE COMMISSION

Respondents

Before:

The Hon. Mr. Hugh A. Rawlins

Chief Justice

The Hon. Mr. Michael Gordon, QC

Justice of Appeal [Ag.]

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal [Ag.]

Appearances:

Mr. Horace Fraser for the Appellant

Mrs. Brender Portland-Reynolds for the Attorney General

2009: October 20;

2010: March 22.

Civil Appeal – Damages – breach of contract – unpaid salaries – gratuity and pension – suspension from duties – reinstatement – whether the appellant abandoned or resigned his job – Prescription – Articles 2122 and 2124 of the Saint Lucia Civil Code – when did the cause of action arise – whether the cause of action was dependent on the reinstatement – whether there was a continuing cause of action –

In March 1997, the appellant was suspended from duty by the Teaching Service Commission after criminal charges were instituted against him. At first, he received half pay but his salary was stopped completely in October 1998. In March 1999 the criminal charges were dropped and the appellant wrote requesting that he be reinstated and his salary be paid but to no avail. He applied for study leave to pursue studies but a response was not forthcoming. In August 1999, he left to pursue studies in law in the United Kingdom where he subsequently qualified as a lawyer in 2002. The Commission advised the Ministry of Education to pay the appellant's salary up to October 2002 but this was not done. The appellant instituted legal proceedings in October 2005 claiming damages for

breach of contract and unpaid salaries, but the claim was dismissed. The learned judge held that salary entitlement was due up to August 1999 when he resigned and by his voluntary act left the state to pursue studies without permission from his employer, thereby abandoning his post as a teacher. It was further held that the claim was prescribed by Article 2122 of the Saint Lucia Civil Code.

Held: setting aside the finding that the appellant resigned or abandoned his job but dismissing the appeal.

1. To sustain a finding of resignation there must be evidence which unequivocally establishes that the appellant formally relinquished his job as a teacher. In the absence of such evidence, the most eloquent manifestation of which would be of a documentary nature, it cannot be said that the appellant resigned.
2. Abandonment connotes a voluntary relinquishment of the performance of the duties of an office with the actual or imputed intention on the part of the office holder to abandon and relinquish that office. The appellant never voluntarily relinquished the performance of the duties of his office. He was unable to execute the functions of his office because of the failure to reinstate him to his job after the criminal charges against him were dropped. As long as the suspension of the appellant continued, he was effectively unable to perform his duties as a teacher. In the circumstances, a finding that the appellant abandoned his job when he went to study in the United Kingdom cannot be justified and is not sustainable. On the evidence, the learned judge could not properly have reached that conclusion.
3. The entitlement to the salary withheld under Rule 33 of the Commission's Regulations depended on an unconditional acquittal by the court of the criminal charges or the clearing of disciplinary proceedings instituted by the Commission. The entitlement does not depend upon nor is it linked to reinstatement. Reinstatement is not a condition precedent for maintaining a claim for unpaid salary. The cause of action therefore arose when the criminal charges against the appellant were dismissed in March 1999 and the payment of his withheld salary was not forth coming.
4. The appellant filed the claim in October 2005 outside the 3 year period prescribed by Article 2122 of the Civil Code for bringing a claim for wages or salaries. It should be noted that a continuing cause of action is not constituted by repeated breaches of recurring obligations or by intermittent breaches of a continuing obligation. There must be a quality of continuance both in the breach and in the obligation. The facts of this case do not constitute a continuing cause of action.

Hole v Chard Union [1994] 1 Ch 293 and National Coal Board v Galley [1958] 1 WLR 16 applied.

JUDGMENT

- [1] BAPTISTE, J.A. [AG.]: This appeal has its genesis in the wrongful refusal or failure to reinstate the appellant to his teaching position and to pay his salary after criminal charges against him were dismissed. The judge dismissed the appellant's claim for damages on the grounds that he had abandoned or resigned his job and that the claim was brought outside the prescription period.

Background

- [2] The appellant was a teacher in the employ of the Government of Saint Lucia and subject to the disciplinary control of the Teaching Service Commission (the Commission). On 10th March 1997 the Commission suspended him from duty following the institution of criminal charges for having sexual intercourse with a female student. He was initially suspended on half pay but on 1st October 1998 his salary was stopped. On 4th March 1999 the charges against the appellant were dismissed. He wrote, without success, seeking reinstatement and the remainder of his salary.
- [3] Undaunted by the situation, the appellant left Saint Lucia in August 1999 and pursued a 3 year course of study in the United Kingdom. He qualified as a lawyer and commenced legal practice in Saint Lucia in 2002. Before going to the United Kingdom the appellant had applied for study leave but was not favoured with a response. On 6th December 2004, the Commission advised the Ministry of Education to pay the appellant's salary up to October 2002. The salary was not paid.
- [4] The appellant instituted legal proceedings on 14th October 2005 claiming damages for inter alia breach of contract, unpaid salaries, gratuity and pension. The claim was dismissed. The learned trial judge held that there was a wrongful failure or refusal to reinstate the appellant and to pay him the arrears of salary due to him after the period of interdiction from duty should have ended. The judge found that

the appellant was entitled to all the remuneration attaching to his post up to August 1999 when he resigned by his voluntary act of leaving the state and embarking on his unauthorized course of study. The judge found that the appellant left the state in 1999 without the permission of his employer and held that he abandoned his employment as a teacher in August 1999 when he commenced legal training.

- [5] The learned judge held that the appellant's claim was prescribed by Article 2122 of the Saint Lucia Civil Code which prescribes a period of 3 years in respect of claims for wages due. The learned judge stated that time would have started to run in August 1999 when the appellant resigned. To succeed, the appellant should have brought his claim within 3 years of August 1999. The claim was well outside the prescribed period having been filed on 14th October 2005. The learned judge also stated that a contractual claim would still be too late as such a claim is prescribed by 6 years by virtue of Article 2124 of the Civil Code. The learned judge reasoned that the appellant ought to have been reinstated by 5th May 1999 at the very latest when he was informed that the criminal charges had been dismissed. Thus the 6 year period would have expired before the claim was filed.

- [6] The judge's findings on abandonment and resignation informed his view on the running of time for the purpose of prescription. The question is whether those findings can be sustained. The appellant advanced two grounds of appeal against the decision of the trial judge.

Grounds of Appeal

Ground 1

- [7] The learned trial judge misdirected himself and therefore erred in law when he made findings of fact that were not pleaded or part of the evidence in the trial

before him.

Matters not pleaded or in evidence

- [8] The findings of fact in Ground 1 relate to the appellant's abandonment of and or resignation from his post as a teacher. Mr. Fraser, learned counsel for the appellant, argued that it was not the respondent's pleaded case that the appellant abandoned his post or resigned, nor did they so contend in the evidence before the court. I have perused the amended defence and I agree with Mr. Fraser that the issue of abandonment or resignation was not pleaded. Mrs. Portland-Reynolds, learned counsel for the respondent, relied on paragraph 5(g)(ii) of the amended defence to rebut Mr. Fraser's contention. That paragraph however provides no answer. It simply states that the claimant left the state in July 2000 to pursue a course of study in law in the United Kingdom and was called as a Barrister-at-Law of the Eastern Caribbean Supreme Court on 8th August 2002. That statement is certainly not a pleading of abandonment or resignation. Something more would be needed to transform it into such a pleading. Mrs. Portland-Reynolds also pointed to the evidence of the respondent's witness, Ms. Esther Brathwaite to show that abandonment or resignation arose on the evidence. Ms. Brathwaite stated that the appellant applied for study leave without pay but his request was not approved nor was he given permission to leave the State.

Ground 2

- [9] The learned trial judge misdirected himself and therefore erred in law by finding that the appellant resigned his post and abandoned his post when he went abroad to study which created the cause of action and the running of time leading to the prescription of his action for recovery of salary due to him.

Abandonment and Resignation

- [10] It is necessary to consider the concept of abandonment of office. What does that concept entail? I adopt the following definition of abandonment of office as stated in Black's Law Dictionary 13 (14th Ed. 1951):

“Abandonment of a public office is a species of resignation, but differs from resignation in that resignation is a formal relinquishment, while abandonment is a voluntary relinquishment through non-user.

It is not wholly a matter of intention, but may result from the complete abandonment of duties of such continuance that the law will infer a relinquishment. It must be total, and under such circumstances as clearly to indicate an absolute relinquishment and whether an officer has abandoned an office depends on his overt acts rather than his declared intention. It implies non-user, but non-user does not of itself constitute abandonment. The failure to perform the duties pertaining to the office must be with actual or imputed intention on the part of the officer to abandon and relinquish the office.”

- [11] It appears to me that to sustain a finding of resignation there must be evidence which unequivocally establishes that the appellant formally relinquished his job as a teacher. In the absence of such evidence, the most eloquent manifestation of which would be of a documentary nature, it cannot be said that the appellant resigned. He never tendered his resignation and never formally relinquished his post as a teacher. Au contraire, he was seeking reinstatement. On the evidence presented there is no basis for a finding that the appellant resigned. Accordingly, the learned judge's findings that the appellant resigned must be set aside.

- [12] Abandonment connotes a voluntary relinquishment of the performance of the duties of an office with the actual or imputed intention on the part of the office holder to abandon and relinquish that office. When one considers the pertinent facts it is clear that the road to abandonment is littered with insurmountable hurdles. A fact of great significance is that the appellant never voluntarily relinquished the performance of the duties of his office. He was unable to execute the functions of his office because of the failure to reinstate him to his job after the criminal charges against him were dismissed.

- [13] The fact that the appellant proceeded to the United Kingdom and pursued a course of study in law for 3 years, without receiving a response to his request for study leave, does not in itself indicate that he had abandoned his job. The matter has to be looked at in context. He remained suspended from his job even after the dismissal of the criminal charges against him. He ought to have been reinstated. During his period of study in the United Kingdom there is no evidence that he was ever called upon to resume his duties and refused. In fact the appellant attended a meeting in Saint Lucia in January 2000 convened by the Ministry of Education, during his period of study in the United Kingdom. This is not a case where the appellant was called back to work to resume his functions and refused to return or failed to return. As long as the suspension of the appellant continued, it was effectively outwith his ability to perform his duties as a teacher. In the circumstances, a finding that the appellant abandoned his job when he went to study in the United Kingdom cannot be justified and is not sustainable. On the evidence the learned judge could not properly have reached that conclusion.
- [14] On this issue it is also instructive to have regard to a memorandum dated 6th December 2004 from the Commission to the Ministry of Education. After reciting the short history of the matter, the memorandum stated that by letter dated 7th May 1999 the Ministry of Education wrote to the Commission informing of the discharge of the rape charge against the appellant. It also sought guidance on how to proceed, since the finding of the court discharging the appellant precluded the Commission from exercising any disciplinary control over him on the same charge.
- [15] The memorandum from the Commission went on to make the critical statement that: "In light of the above it is evident that Huggins N. Nicholas is still a teacher by profession". Importantly therefore, as late as December 2004 the Commission stated quite emphatically that the appellant was still a teacher. This of course is inconsistent with a finding that the appellant had resigned or abandoned his job sometime earlier.

Prescription and Cause of Action

[16] This leads to the issue of prescription and the question is: when did the cause of action arise? Mr. Fraser contended that while on suspension the respondent was entitled to lawfully withhold the appellant's salary and he could not maintain a claim for the said salary while the suspension was in force. Mr. Fraser argued that reinstatement was a condition precedent for payment of salaries accrued and due and cited Rule 33 of the Teaching Service Commission Regulations¹ to support his proposition. Rule 33 states:

“A teacher may be suspended on half pay or no pay. A teacher suspended on half pay shall be entitled to the other half of his or her salary or full salary, if on no pay for the period of suspension should the court unconditionally acquit him or her or should he or she be cleared of disciplinary proceedings instituted by the Commission.”

[17] Mr. Fraser referred to Article 2097 of the Civil Code and stated that it provides that prescription of personal actions does not run with respect to debts depending on a condition until such condition happens. I do not believe that Article 2097 of the Civil Code assists the appellant's case. To successfully invoke Article 2097 of the Civil Code the appellant must show that payment of a debt depends on a condition which remains unfulfilled. Mr. Fraser cannot rely on reinstatement as a condition which remains unfulfilled because reinstatement is not a condition precedent for the payment of salaries accrued and due.

[18] The question is whether there is any condition which remains unfulfilled. I again revert to Rule 33 of the Commission's Regulations. Rule 33 clearly provides that entitlement to salaries withheld is dependent upon an unconditional acquittal by the court or being cleared of disciplinary proceedings. The charges against the appellant were dismissed on 4th March 1999. He was unconditionally acquitted by the court. The condition which had to be fulfilled was fulfilled. The condition which had to happen happened on 4th March 1999. In terms of Article 2097 of the Civil Code time would have started running from 4th March 1999.

¹ Cap. 18.02 Revised Laws of Saint Lucia 2005

[19] Mr. Fraser referred to *Police Service Commission v Nash*² where Byron JA stated at page 172, that the limitation period commences at the date of the legal injury. Mr. Fraser stated that the legal injury in this case was the non payment of accrued salaries and submitted that the Ministry of Education never refused to pay the accrued withheld salaries to the appellant at any time before 2004. Mr. Fraser asked the following question: Could it be said that the Ministry of Education was in breach of the employment contract by not paying the accrued withheld salaries to the appellant when no such demand was made by the appellant after reinstatement? Having answered “no”, Mr. Fraser asserted that prescription could only have started running after the appellant was reinstated and made a demand for payment of withheld salaries and the Ministry of Education failed or refused to adhere to the demand. With respect, the fallacy in this argument resides in the unwarranted and unsound nexus between reinstatement and the cause of action. The entitlement to the salary withheld depended on an unconditional acquittal by the court. That is when the cause of action arose.

[20] Mrs. Portland-Reynolds argued that the cause of action arose when the appellant was entitled to receive his unpaid salaries. That would be on 4th March 1999 when the charges against him were dismissed. The argument can also be extended to 19th May 1999 when the Commission informed the Ministry of Education that no disciplinary charges would be brought against the appellant. It is therefore incorrect to state that the cause of action is dependent on the reinstatement of the appellant. I am persuaded by this argument.

[21] The entitlement to salary withheld under Rule 33 of the Commission’s Regulations is dependent upon the unconditional acquittal of criminal charges or the clearing of disciplinary proceedings instituted by the Commission. The entitlement does not depend upon nor is it linked to reinstatement. If it were so linked or dependent, it would mean that a public officer who was never reinstated would never be able to maintain a claim for unpaid salary. Reinstatement is not a

² 47 WIR 166

condition precedent for maintaining a claim for unpaid salary. In the absence of any evidence that the appellant was not unconditionally acquitted, as of 4th March 1999 he became entitled to the payment of his withheld salary. The cause of action arose on 4th March 1999 when the criminal charges against the appellant were dismissed. The appellant's claim was filed on 14th October 2005 well outside the 3 year period prescribed by Article 2122 of the Civil Code for bringing a claim for wages or salaries.

Was there a continuing cause of action?

- [22] By bringing a claim for unpaid salaries and continuing, the appellant implied that the cause of action continues. In rebutting that contention, Mrs. Portland-Reynolds referred to Halsbury's Laws of England³ which states:

"where there has once been a complete cause of action arising out of contract or tort time begins to run and subsequent circumstances which, but for the prior wrongful act of default would have constituted a cause of action are disregarded."

Mrs. Portland-Reynolds submitted that "subsequent circumstances" are disregarded and time started to run on 4th March 1999 and not thereafter. I agree.

- [23] The phrase 'continuing course of action' was defined in *Hole v Chard Union*⁴ by Lindley LJ thus:

"What is a continuing cause of action? Speaking accurately there is no such thing; but what is called a continuing cause of action is a cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought."

- [24] In *National Coal Board v Galley*⁵ Pearce LJ explained that the term did not include all repetitious conduct but that it was a question of degree whether separate acts were so knit together, so close in time and quality as to be properly described in the words 'a continuing cause of action'. Pearce LJ stated at

³ 4th Ed. Volume 28 paragraph 622

⁴ [1894] 1 Ch 293 at page 295

⁵ [1958] 1 WLR 16

page 26:

“...But where a contract requires payments to be made on stated dates (for example, a contract to pay an annuity of £1000 per annum in equal monthly installments on the first day of each calendar month) failure to pay the installment due on 1st February is not, we should have thought, a continuance of the cause of action constituted by failure to pay the installment due on 1st January, but a distinct cause of action arising for the first time on 1st February and at no earlier date.”

Pearce LJ concluded at page 27:

“A continuing cause of action is not in our view constituted by repeated breaches of recurring obligations nor by intermittent breaches of continuing obligation. There must be a quality of continuance both in the breach and in the obligation.”

[25] I adopt and apply the law stated in *Hole v Chard Union, and National Coal Board v Galley*. The facts alleged in the instant case do not constitute a continuing cause of action. A continuing cause of action is not constituted by repeated breaches of recurring obligations.

[26] The appellant's claim for breach of contract is grounded in the Ministry of Education's failure in not following the directive of the Commission to pay his unpaid salaries from 1997 to October 2002. This directive emanated from a memorandum dated 6th December 2004 from the Commission to the Ministry. It is noted at once that the memorandum advising payment could not and did not give the appellant any cause of action against the Ministry. In any event an action for breach of contract ought to be filed within six years of the breach for the claim to succeed. Actions for breach of contract are prescribed by 6 years pursuant to Article 2124 of the Civil Code. This period expired before the claim was filed. Article 2129 of the Civil Code stipulates that:

“In all the cases mentioned in articles 2111, 2121, 2122, 2123 and 2124 the debt is absolutely extinguished and no action can be maintained after the delay for prescription has expired except in the case of promissory notes and bills of exchange, where prescription is precluded by a writing signed by a person liable upon them.”

[27] In light of the foregoing, the claim for damages for breach of contract cannot be maintained. Even if the directive from the Commission to the Ministry of Education concerned the appellant's unpaid salary, the claim would still be prescribed by Article 2121 of the Civil Code which provides a 3 year period for bringing such claims. The learned trial judge correctly ruled that the claim was prescribed. The debt was absolutely extinguished as a matter of law and no cause of action could be maintained.

[28] In conclusion, although the judge's finding that the appellant resigned or abandoned his job cannot be sustained and is set aside, the learned judge was correct in dismissing the claim on the ground that it was brought outside the prescription period. The appeal is accordingly dismissed.

[29] In the court below the judge awarded prescribed costs of \$60,122.00 to the Attorney General. The respondent is to have 1/3 of the costs on appeal as well as costs in the court below.

Davidson Kelvin Baptiste
Justice of Appeal [Ag.]

I concur.

Hugh A. Rawlins
Chief Justice

I concur.

Michael Gordon, QC
Justice of Appeal [Ag.]