

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim No. BVIHCV 2022/0323

**IN THE MATTER OF A CLAIM FOR JUDICIAL REVIEW PURSUANT TO PART 56 OF THE CIVIL PROCEDURE
RULES, 2000**

AND

**IN THE MATTER OF THE DECISIONS OF HIS EXCELLENCY, THE GOVERNOR, THE DIRECTOR OF HUMAN
RESOURCES (ACTING), AND THE PUBLIC SERVICE COMMISSION TO DIRECT THE APPLICANT TO PROCEED
ON COMPULSORY LEAVE**

AND

**IN THE MATTER OF THE DECISION OF HIS EXCELLENCY THE GOVERNOR ACTING ON THE ADVICE OF THE
PUBLIC SERVICE COMMISSION ON THE 7th MARCH, 2023 TO INTERDICT THE APPLICANT**

AND

**IN THE MATTER OF THE DECISION OF THE PUBLIC SERVICE COMMISSION ON THE 7th MARCH, 2023 TO
COMMENCE DISCIPLINARY PROCEEDINGS AGAINST THE APPLICANT**

AND

**IN THE MATTER OF THE DECISION OF HIS EXCELLENCY THE GOVERNOR AND THE PUBLIC SERVICE
COMMISSION TO INTERDICT THE APPLICANT**

BETWEEN:

WADE SMITH

CLAIMANT

AND

THE GOVERNOR

1st DEFENDANT

THE DIRECTOR OF HUMAN RESOURCES (ACTING)

2nd DEFENDANT

THE PUBLIC SERVICE COMMISSION

3rd DEFENDANT

Appearances: Terrence F. Williams and Karlene Thomas-Lucien, instructed by Chase Law and Co. for the Claimant
Nicosie Dummett, Principal Crown Counsel and Abayna Devonish, Crown Counsel for the 1st, 2nd and 3rd Defendants

2024: May 17th

ORAL DECISION

[1] **YOUNG J:** In breach of Rule 20.1 of the Civil Procedure Rules the Claimant filed a further amended Claim Form on the 5th February, 2024 without the leave of the Court. That same date they filed an application to further amend their claim form. For the following reasons the Court has granted leave.

[2] The relevant parts of Rule 20.1 provide:

- 20.1 (1) A statement of case may be amended once, without the court's permission, at any time prior to the date fixed by the court for the first case management conference.
- (2) The court may give permission to amend a statement of case at a case management conference or at any time on an application to the court.
- (3) When considering an application to amend a statement of case pursuant to rule 20.1(2), the factors to which the court must have regard shall include –
- (a) how promptly the applicant has applied to the court after
 - (b) becoming aware that the change was one which he or she wished to
 - (c) make;
 - (d) the prejudice to the applicant if the application were refused;
 - (e) the prejudice to the other parties if the change were permitted;
 - (f) whether any prejudice to any other party can be compensated by
 - (g) the payment of costs and or interest;
 - (h) (e) whether the trial date or any likely trial date can still be met if
 - (i) the application is granted; and
 - (j) (f) the administration of justice.

[3] The Court considered the factors outlined in Rule 20.1(3):

Promptitude:

[4] The Fixed Date Claim Form was filed in November, 2023. The Claimant's evidence was that in preparing for the pretrial review Counsel for the Claimant recognised certain errors and omissions. He had been through a period of very personal bereavement in November and December, 2023 and had been unable to scrutinize the pleadings before.

- [5] Counsel for the Defendants submitted that the Claimant was well aware what the facts were and how the case ought to have been pleaded since the Defendants had filed their response to the application for leave. Yet even after making initial amendments he delayed until the date of the pre-trial review.

Court's consideration:

- [6] This application was filed in less than three months since the filing of the Claim. It is a judicial review matter where speed is important and expected. Nonetheless even if the court was to count from the date the claim had been filed this Court can not hold that a three month delay was excessive. When the circumstances under which counsel for the Claimant laboured, it would be no less than brutal to expect more from him during that time. This Court finds that the application was prompt though not conveniently filed.

Prejudice to the Respondent:

- [7] The Respondent says the basis of the Claim will be fundamentally changed from not only decisions made but to also include recommendations made. Since the former Governor whose decisions were sought to be reviewed in this matter no longer holds that office, sourcing information to file fresh affidavits may prove difficult if the need arises.
- [8] The Court notes that the amendments are primarily related to the claims against the 2nd and 3rd Defendants and not the 1st Defendant. Those against the 1st Defendant are mainly legal in substance and would not require much if any fresh evidential material. In any event, it would seem easy enough to be able to source any required information and there is a current Governor installed. The past Governor had not been sued in his personal capacity.
- [9] The Defendants submitted further that the Claimant seeks to amend his claim each time they have put up a good defence. I am reluctant to even attempt to offer a view on this submission where the application was filed one month after the Defendant's affidavit had been filed out of time.
- [10] The Defendants also raised the likelihood of success on some of the amendments sought. I do not believe this to be any part of the considerations outlined in Rule 20.1.

- [11] The Defendants then raised that the Claimant sought to have the Court rubber stamp or ratify his non compliance. They rely on **Sandra Ann-Marie George v Nigel Don-Juan Glasgow**¹ and contend that it is not open to the court to assist the Claimant by using the overriding objective.
- [12] I am not sure that this case helps the Defendants in any way. There the Defendant had filed a defence which was a bare denial. the Claimant applied to strike it out and the Defendant filed a notice of application in opposition which included an uncertain if not altogether absent, application for leave to amend the defence. Leave to amend had only been stated as an alternative to an order sought and nothing more. The master heard both applications together and made an unless order striking out the defence unless an application to amend the defence was filed by a particular date.
- [13] In setting aside this order the Court held that the application to amend the defence was defective and had no “evidential basis upon which the learned Master could have exercised her discretion....” – para 32 and “The applicant had failed to reach the threshold stipulated by the relevant rules and practice direction in order to benefit from an exercise of the court’s discretion in his favour....” – Para 36. Yet, the Master had attempted to rely on the overriding objective to fill the gap created by the defective application and the deficient evidence.
- [14] The Claimant in the case at bar is not trying to fill any such gap nor has he asked the Court to assist him in such an endeavour. He is seeking leave to amend his defence in circumstances where the document had been filed without leave and no application to strike it out had yet been made. He is seeking to cure his error in the manner prescribed by the rules. He has asked the Court to make the appropriate considerations and has provided the requisite evidential basis to do so. There is no need to resort to the overriding objective and the Court has not been asked to do this, nor will it.

Prejudice to the Applicant:

- [15] The Applicant’s case will not change considerably with the amendments sought. They are in a small part necessary cosmetic changes but to a larger extent a proper and precise articulation of all that had been placed before the court in affidavits and submissions prior. If the application is denied the Claimant may not be able to fully address the Court on some of these issues.

¹ SVGVAP13/0003

Trial Date:

- [16] In November the matter had been listed for pre trial review on 5th February, 2024 and trial on the 5th March, 2024. Other case management directions were also given. At the pretrial review the Defendants sought an extension of time in which to file their affidavit in response. The Claimant did not oppose that application and the Court extended the time making good the affidavit they had already filed on the 17th January, 2024.
- [17] At that same hearing the Claimant informed the Court that they had filed the subject application that same day 5th February. The Court adjourned the hearing of the application to the 5th March (the original trial date) and allowed the Defendant time to file a response thereto - on or before the 20th February. Any reply was to be filed no later than the 28th February.
- [18] Because of the state of the matter on the 5th February it seemed unlikely that it would be trial ready by the 5th March. Moreover the Court's calendar did not allow an earlier hearing date than the date already set for trial.
- [19] This indeed meant that the trial date was vacated to accommodate the hearing of the application and the reference to a "trial date to be set" in the application is not accurate. A trial date had already been set.
- [20] I agree with Counsel for the Defendants that the Claimant's application could have been filed earlier that the date of the pre trial review and perhaps the trial date could possibly have been saved. This, though, was unlikely considering the state of the pleadings at that time and no submissions had yet been filed. The matter has also lost the opportunity of having been heard already or even being heard in a timely manner since the Court's calendar is congested.
- [21] Thus far, no new trial date has been given and the filing of the amended claim form will no more delay the matter than it has already been delayed.

Administration of Justice:

- [22] I do not believe there will be any real injustice wrought on the Defendants. As stated earlier, the amendments do not change the landscape significantly but chart the path more clearly and that serves a most useful purpose.

Compensation:

- [23] The Defendants may be adequately compensated in cost. This is an administrative claim and costs are generally only awarded where the Claimant has behaved unreasonably. The Court will award costs to the Respondents in the sum of \$2,000.00.

Conclusion:

- [24] As seen in **Mark Brantley v Dwight Cozier**², each factor to be considered on an application for leave to amend is ascribed no particular weight. This allows the Court to weigh and measure the factors in each case individually. This Court has weighed and measured and finds that the Applicant should be granted leave to amend. The justice of the case demands nothing less.

[25] **It is Ordered:**

1. Leave is granted to the Claimant to further amend their Claim.
2. The further Amended Claim filed on the 5th February, 2024 is deemed properly filed.
3. The Defendants may file any affidavit in response within 28 days, that is on or before 19th June, 2024.
4. The Claimant may file any Reply within 14 days, that is on or before the 5th July, 2024.
5. Pretrial review is scheduled for 24th September, 2024.
6. Costs to the Defendants in the sum of \$2000.00.

**Sonya Young
High Court Judge**

By the Court

Registrar

² SKBHCVAP 2014/0027