

**EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA
IN THE HIGH COURT OF JUSTICE**

CLAIM NO. DOMHCV 2017/0144

IN THE MATTER OF THE INDUSTRIAL RELATIONS ACT
CHAPTER 89 :01

AND

IN THE MATTER OF THE PROTECTION OF EMPLOYMENT ACT
CHAPTER 89 :02

AND

IN THE MATTER OF THE APPOINTMENT OF A TRIBUNAL TO HEAR
AND DETERMINE AN APPLICATION BY ATTORNEY AT LAW CARA
SHILLINGFORD ON BEHALF OF MR KENRICK AMBO THAT
SUBSEQUENT TO THE HIGH COURT RULING #DOMHCV2010/0297
WHICH DETERMINED THAT MR AMBO WAS WRONGFULLY
TERMINATED BY THE DOMINICA AIR AND SEA PORT AUTHORITY
(DASPA) (IN ACCORDANCE WITH SECTION 38(1)(B) OF THE
PROTECTION OF EMPLOYMENT ACT AND ARTICLE 26 OF THE
DASPA COLLECTIVE AGREEMENT, THE MANAGEMENT OF DASPA
HAS FAILED TO COMPLY WITH THE HIGH COURT RULING BY

FAILING TO ADHERE TO ARTICLE 26 OF THEIR COLLECTIVE
AGREEMENT

BETWEEN:

[1] KENRICK AMBO

Applicant

and

[2] DOMINICA AIR AND SEA PORT AUTHORITY

Respondent

Before: The Hon. Madam Justice M E Birnie Stephenson

Appearances:

Miss Jilane – Milani Prevost for the Applicant

Mrs Heather F Felix-Evans for the Respondent

2017: August 31

December 15

2019: March 1

RULING

- [1] **Stephenson J.:** Before the court is an appeal brought by way of fixed date claim filed on the 11th May 2017 of Kenrick Ambo (hereinafter referred to as “Ambo”) under section 15(2) of the Industrial Relations Act¹ against a decision taken by An Industrial Relations Tribunal which was appointed to hear and determine an application brought by Ambo. (Hereinafter referred to as “the tribunal”)
- [2] In the case at bar Ambo lost his job. Having lost his job he sought relief from the High Court for wrongful termination. He was successful in that endeavour. Mr Justice Errol Thomas found in his favour and awarded him damages for wrongful termination.²
- [3] The learned Judge declined to make an order of reinstatement. Mr Justice Thomas agreed with the submission of Learned Senior Counsel Alick Lawrence who appeared on behalf of the defendant the Dominica Air and Sea Port Authority (“DASPA”) in that, if the claimant was seeking to be reinstated he should have approached the requisite statutory tribunal as the common law remedy for wrongful dismissal does not include reinstatement.

¹ Chapter 89:01 of the Laws of the Commonwealth of Dominica

² Kenrick Ambo –v- Dominica Air & Seaport Authority DOMHCV2010/0297

- [4] In his findings the Learned Judge having agreed with Senior Counsel's submissions *inter alia* said "Accordingly no order is made on the matter of reinstatement as it does not arise under the law or the factual circumstance."³
- [5] Ambo was clearly satisfied with the ruling of the court in that matter, that he was wrongfully terminated and that he was entitled to an award of damages there for and after receiving and accepting his damages he filed a notice of satisfaction bringing that matter to an end. It is noted that the claimant did not appeal the judge's ruling regarding the issue of reinstatement.
- [6] Ambo then saw it fit to seek to enforce his statutory right to be reinstated or paid in lieu of his reinstatement when he made an application through his then Solicitor Miss Cara Shillingford pursuant to section 38(1)(b) of the Protection of Employment Act ("The Act") and Article 26 of the Collective agreement between DASPA and the Public Service Union,⁴ to the Minister of National Security, Immigration and Labour to be reinstated to his position as Shift Supervisor at DASPA. He also claimed an entitlement to monetary relief under section 38(1)(c) of the Act

³ Ibid at paragraph 84

⁴ Chapter 89:02 of the Laws of the Commonwealth of Dominica

- [7] Pursuant to this move by Ambo the Ministry followed the legislative formula and sought to commence conciliation and wrote to the defendant regarding the matter.
- [8] Learned Counsel Mrs Felix Evans acting on behalf of DASPA stated in her letter of response to the Ministry that if Ambo had any complaints relating to these issues he should either go back to the High Court or to the Court of Appeal.⁵
- [9] Subsequently a tribunal was appointed pursuant to a warrant issued by the Minister for Justice, Immigration and National Security⁶.
- [10] The tribunal after receiving and considering both oral and written submissions from counsel representing the parties in their report to the Minister declined to grant the relief sought by the claimant.
- [11] The tribunal in its written report⁷ made the following findings:

⁵ Letter of Heather Felix Evans to the Permanent Secretary Ministry of National Security, Labour and Immigration exhibited to the affidavit of Mr Bardouille sworn in opposition to the claim at bar

⁶ The Warrant was exhibited at "KA 7" ibid

⁷ Exhibit "KA 9" of the Affidavit in support of Kenrick Ambo filed on the 13th July 2017 ⁸ Op cit

- a. that there was no order by the High Court to reinstate Ambo to his previous post at DASPA;
- b. that the ruling of the court was that reinstatement did not arise in law or on the facts;
- c. that Article 26 of the Collective Agreement was not applicable since both parties were not agreed that the termination was unfair.
- d. that pursuant to section 38(2) of the Protection of Employment Act⁸ reinstatement is not an absolute right where an employee has been unfairly terminated;
- e. even if the court ordered reinstatement that the tribunal did not have authority to demand that DASPA comply with the court's decision;
- f. that the learned trial judge addressed the issue of reinstatement and held that "no order is made on the matter of reinstatement as it does not arise under the law or the factual circumstances" ⁹;
- g. that the judge had already awarded damages to Ambo;
- h. that the court having addressed the issue of reinstatement effectively barred the tribunal from addressing it;
- i. that any disagreement or discontent with the court's ruling should be addressed to and dealt with by the Court of Appeal.

- [12] Ambo's contention is that the tribunal in making its decision erred in law and contravened section 15(2) of the Industrial Relations Act¹⁰.
- [13] Ambo contended that contrary to the view formed by the tribunal, Justice Thomas in his judgment concluded that the question of his reinstatement was a statutory remedy that could not be explored by the high court and that the authority lay with a statutory tribunal created under the Act to determine whether the remedy of reinstatement was a remedy suited to his case.
- [14] Ambo also contended that Mr. Justice Thomas was limited to considering only a breach of his common law right, that is that he sought relief from the court for wrongful dismissal which was limited to the law of contract.
- [15] Ambo further contended that there are two separate and distinct causes of action available to him, that he has the cause of action of unfair dismissal under legislation and the common law cause of action of wrongful dismissal and these causes of action are dealt with by the Industrial tribunal and the Court respectively. Learned Counsel on behalf of Ambo relied on the case emanating out of the British Virgin Islands **Byron Smith –v- British Virgin**

Islands Electricity Corporation⁸ and Ray George –v- British Virgin Islands Ports Authority⁹.

[16] Learned Counsel Miss Jillane-Melanie Prevost on behalf of Ambo also made reference to the statement of Sir Vincent Floissac CJ in **Burrel –v- Schnieder**¹⁰ when he said

“At the time of the enactment of the Labour Code, an employee had a common-law right not to be wrongfully dismissed. The Labour Code did not abolish that right. The Labour Code merely supplemented that right by a statutory right not to be unfairly dismissed. The statutory right was created by section C55 of the Labour Code which provides that:

‘Every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by his employer; and no employer shall dismiss any such employee without just cause.’

The result is that an employee now has a common-law right and a statutory right. The common-law

⁸ HCVAP2008/010

⁹ Civil Appeal no 28 of 2006 British Virgin Islands

¹⁰ (1995)50 WIR 193

right is based on contract and the statutory right is based on social policy. The provisions of sections C57 and C58 of the Labour Code ensure that the two rights harmoniously coexist”¹¹.

[17] Miss Prevost submitted that the tribunal erred when it held that pursuant to Article 26 of the collective agreement, mutual agreement of the parties that the employee was wrongfully terminated was necessary in order for there to be reinstatement. The thrust of counsel’s submission is that the requirement for agreement under the collective agreement was void as it did not line up with the provisions of the Protection of Employment Act.

[18] Miss Prevost also submitted that the tribunal also erred when it confined itself to the issues contained in the Warrant signed by the Minister. Counsel submitted that the Warrant disclosed no cause of action, pleading or any relevant information for consideration and in the circumstances there was no ground for the tribunal to dismiss the matter before it.

[19] Miss Prevost submitted further that the tribunal failed to exercise its authority and perform its duties as mandated

¹¹ Ibid at pages 195 to 196

by sections 36, 37 and 38 of the Act, that the decision was dismissive in its conclusion and tone and does not reflect a thorough interpretation of the applicable laws.

[20] Ambo further complained that the tribunal misconstrued and misinterpreted the decision of Mr Justice Thomas by concluding that the learned Judge dealt with the issue of reinstatement.

[21] The application was strenuously resisted by DASPA who relied on the same arguments presented on its behalf to the tribunal. DASPA argued that the tribunal's decision was right and should be upheld, the claimant's application dismissed with costs.

[22] Learned Counsel Mrs Heather Felix-Evans on behalf of DASPA also submitted that Ambo also failed to address the issue of deficiency and or the ultra vires of the Warrant which in fact left the tribunal without authority or jurisdiction to hear Ambo's complaint.

The Warrant

[23] Learned Counsel Felix-Evans submitted that the terms of reference as stated in the warrant on 6th June 2016 was specifically stated that the tribunal was to hear and determine Ambo's complaint that the management of

DASPA failed to comply with the High Court ruling by refusing to reinstate him to his substantive post.

[24] It was also submitted that the tribunal is a creature of statute and it derives its powers from statute and the relevant statutes¹² do not give the tribunal power to enforce a court order. Further, that the powers given to the tribunal are to hear and determine labour related complaints by employers, employees and trade unions.

[25] Learned Counsel on behalf of DASPA submitted that if Ambo believes that there has been failure on the part of DASPA to comply with the order of the High Court then his only option would be to go back to the High Court for enforcement. Further, if he disagreed with the decision of the High Court not to order his reinstatement his course of action should have been to appeal to the Court of Appeal.

[26] DASPA's submission was that the terms of the warrant were clear and unambiguous and that the tribunal had no authority or jurisdiction to act in this matter and could not hear the complaint before it. Learned Counsel Mrs Felix-Evans maintained that the Tribunal's decision is right and

¹² The Industrial Relations Act Chapter 89:01 of the Laws of the Commonwealth of Dominica and The Protection of Employment Act Chapter 89:02 of the Laws of the Commonwealth of Dominica chapter 89:02

should be upheld and Ambo's appeal should be dismissed with costs.

[27] Learned counsel Felix-Evans also contended that the submissions made on behalf of Ambo are totally misconceived. Counsel submitted that counsel for Ambo failed to address at all or properly address the issues of *res judicata* or issue estoppel and double recovery which are the principles of law which preclude the tribunal or any court from hearing the claim by the same parties against the same parties on the same facts and issues.

Did the tribunal have the authority or jurisdiction to carry out its mandate as stated in the Warrant?

[28] Learned Counsel Mrs Felix-Evans submitted that the tribunal got its authority to act from the warrant of appointment. That the warrant set out the mandate and terms of reference of the tribunal. It was also submitted that the warrant informs the members of the tribunal and the parties before the tribunal of the complaint or the matter that the tribunal is appointed to hear and determine. It was submitted on behalf of DASPA that for the tribunal to go outside of the terms of its mandate would amount to the tribunal going on a frolic of its own and would be acting without authority.

[29] The labour tribunal in the case at bar is a creature of statute which gets its power to adjudicate pursuant the reference made to it by the Minister responsible for labour and industrial relations. The adjudication of the labour tribunal has at all material times to be in accordance with the terms of reference made to it.

[30] In the Indian cases of **National Engineering Industries Ltd –v- The State of Rajasthan**¹³ and in the case of **Mukand Ltd vs Mukand Staff & Officers**¹⁴ the courts in considering legislation similar to the two Dominica Acts under consideration in the case at bar and they held that when a matter is referred to a labour tribunal the reference is limited to the dispute between the parties and the tribunal cannot “adjudicate matters not within the purview of the dispute actually referred to it by the order of Reference”.

[31] In the **National Engineering Industries Ltd Case** the court stated

"It is hardly necessary to emphasise that since the jurisdiction of the Industrial Tribunal in dealing with industrial disputes referred to it under section 10 is

¹³ Supreme Court of India Case no 16832/96

¹⁴ Judgment With Civil Appeal NOS. 7340-7341 OF 2001 Dr. AR. Lakshmanan, J. (India)

limited by section 10 (4) to the points specifically mentioned in the reference¹⁵ and matters incidental thereto, ...”

[32] The Tribunal as was appointed is a creature of statute¹⁶ and is required to take action as directed by the words of the warrant. The warrant was quite clear in its language in that the tribunal was appointed to

”hear and determine the complaint received from Attorney at Law Cara C Shillingford on behalf of Mr Kenrick Ambo alleging that subsequent to high court ruling #DOMHCV2010/0297 which determined that Mr Ambo was wrongfully terminated by DASPA and in accordance with section 38(1) of the Protection of Employment Act and Article 26 of their Collective Agreement, the Management of DASPA has failed to comply with the ruling by refusing to reinstate Mr Ambo to his substantive position. ...”

[33] It is DASPA’s contention that based on the wording of the warrant the Tribunal was restricted to the terms of the warrant and in the circumstances of this case the tribunal had no power to enforce the Order of the High Court.

¹⁵ The reference referred to in these cases is the same as the warrant issued to the tribunal here in Dominica under the relevant Acts.

¹⁶ See section 6(1)(c) of the Industrial Relations Act Chapter 89:01 of the Revised Laws of Dominica

[34] Based on these authorities, this court agrees with the submissions of Mrs Felix-Evans that the Tribunal could only lawfully hear and determine the complaints before it and for the Tribunal to decide on any other matter it would have been acting without lawful authority. Therefore the only dispute which the Tribunal had before it was to hear and determine whether the management of DASPA failed to comply with the ruling of the High Court by refusing to reinstate him to his substantive post. To hear and determine any other complain would be acting outside the terms of its appointment and would be illegal.

[35] Having decided that the Tribunal was restricted to decide on the terms of the warrant establishing it, was the tribunal correct in concluding that it did not have the jurisdiction to entertain the claim that was before it?

[36] Does the tribunal have the authority to hear a complaint that “subsequent to the high court ruling ... which determined that Ambo was wrongfully terminated by DASPA ... has failed to comply with the ruling by refusing to reinstate Ambo to his substantive position.”

[37] Firstly, from a review of the decision of the High Court it is clear that the Learned Trial judge thoroughly examined the facts of the case and found that Mr Ambo was

wrongfully terminated and ordered damages to him. The Learned Judge did not order the reinstatement of Mr Ambo to his substantive position. In fact Mr Justice Thomas particularly stated that "... no order is made on the matter or reinstatement as it does not arise under the law or the factual circumstance."¹⁷

[38] It is therefore fair to state that there never was an order for Mr Ambo's reinstatement so there was no failure on the part of DASPA to comply with the ruling of the High Court by refusing to reinstate Mr Ambo to his substantive position.

[39] Secondly the wording of the warrant states that Ambo was seeking to enforce what he perceived to be or understood to be a ruling of the High Court. If Mr. Justice Thomas did make an order for his reinstatement the Civil Procedure Rules 2000 which governs civil litigation in our jurisdiction, makes provisions for the enforcement of judgments in Part 45 which certainly does not include approaching a tribunal of inferior jurisdiction for enforcement.

[40] It is trite law that even if Ambo was seeking to enforce an order of court made in his favour the Labour Tribunal was

¹⁷ Ibid at paragraph 84

not clothed with the jurisdiction to enforce that order. In the circumstances of this case I agree with the tribunal that “High Court rulings and decisions cannot be referred to the Industrial Relations Tribunal for enforcement” and find that the tribunal was quite correct in law in so finding.

Res judicata, issue estoppel and double recovery

[41] DASPA contends that the claimant has not properly addressed or addressed at all the issues of *res judicata*, issue estoppel or double recovery which are issues which preclude any court or tribunal from hearing a complaint between the same parties on the same facts and issues which have already been decided on.

[42] Learned Counsel Mrs Felix-Evans further submitted that the Tribunal could not hear or determine the reinstatement on the ground that Mr Ambo was estopped from having the cause of action of unfair dismissal or the issue of his re instatement relitigated.

[43] Having regard to the reference to *res judicata* and issue estoppel it is necessary to briefly look at the earlier proceedings brought by Mr Ambo.

[44] Learned Counsel submitted that in his claim in DOMHCV0297/2010 he claimed that he was wrongfully

or¹⁸ unfairly summarily dismissed.¹⁹ That in that matter he sought an order of court reinstating him to his position and damages with interest thereon. Mr Felix Evans contended that when Mr Ambo sought relief for wrongful or unfair dismissal he appreciated that he could not get both remedies.

[45] Having ventilated his case before the High Court based on his claim that he was wrongfully or unfairly summarily dismissed the court found that he was wrongfully terminated and determined what remedy he was entitled to in the circumstances of his case. It was also submitted that Mr Justice Thomas refused to grant Mr Ambo the relief he sought to be reinstated to his job, which refusal was premised on the grounds that:

- a. It was not a relief that could be granted at common law and that if he wished to be reinstated he should have sought relief from the Industrial Tribunal;
- b. That on the facts presented to the court reinstatement would not be granted as the learned trial judge agreed with the submission of Senior Counsel Alick Lawrence appearing for DASPA that the relationship between Ambo and the Chief Executive Officer of DASPA was so acrimonious that *“to order the claimant be reinstated would create a very*

¹⁸ Emphasis mine

¹⁹ Paragraph 8 of his statement of claim in DOMHCV2010/0297

*unpleasant and disruptive environment and perhaps even a combusive one.*²⁰ Learned Counsel submitted that Mr Justice Thomas considered the facts and refused to grant Mr Ambo the remedy of reinstatement which he requested. That the decision of the court was one which was heard on the merits and disposed of and the parties are bound by the decision.

[46] Learned Counsel maintained that Mr Ambo could not seek to have the Tribunal entertain a separate cause of action of unfair dismissal as a separate cause of action entitling him to another remedy on the same facts as was already adjudicated on.

[47] Further, that his dismissal did not give rise to two separate causes of actions. Learned Counsel stated that the law is that an employee has to rely and seek a remedy for unfair dismissal or wrongful dismissal not both. Reliance was placed on the Court of Appeal decision in **Ray A George –v- British Virgin Islands Port Authority**.²¹ It was submitted that this case established that there is the option of pursuing wrongful dismissal which is a common law right or unfair dismissal which is statutory, but that the existence of these two

²⁰ Paragraph 83 of the Judgment of Thomas J (Ag) in DOMHCV2010/0297

²¹ Civil Appeal no 28 of 2006

rights did not give rise to two separate causes of action. That once one of the rights were pursued and brought to finality, the cause of action is extinguished.

[48] Mrs Felix-Evans submitted that in the case at bar Ambo having approached the court for wrongful or unfair dismissal and having obtained judgment for wrongful dismissal there remains nothing else between him and his former employer on the same circumstances and facts.

[49] It was further submitted that the doctrine of res judicata precluded the Labour Tribunal and in fact any other tribunal from hearing and making a further or fresh determination in the matter.

[50] DASPA contends that Mr Ambo in all the circumstances of this case is also precluded by the doctrine issue estoppel from relitigating the facts of this matter. That the court has already found and ruled that he is not entitled to reinstatement and he is not entitled to seek such an order separately and if he was in disagreement with the finding of Justice Thomas he ought to have appealed the matter. Further that the learned trial judge has already made an award for compensation to Mr Ambo for wrongful dismissal which award Mr Ambo was clearly satisfied with and he cannot

now seek to recover compensation twice in respect of the same matter.

[51] The issue now to be considered is whether the doctrine of res judicata applies to the case at bar and whether Mr Ambo is estopped the issues having been adjudicated in earlier proceedings

[52] In **Mills v Cooper** ²² Lord Diplock said that this about the doctrine of Res Judicata

“... a party to civil proceedings is not entitled to make, as against the other party, an assertion, whether of fact or of the legal consequences of facts, the correctness of which is an essential element in his cause of action or defence, **if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties** or their predecessors in title and was found by a court of competent jurisdiction in such civil proceedings to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him.’

²² [1967] 2 All ER 100. There, Diplock LJ said (at page 104):

[53] In the case at bar it is a simple issue of fact as to whether or not the issue which Mr Ambo sought to engage the Labour Tribunal was already litigated and decided on by the High Court between himself and DASPA. Was that issue raised by him and was finally and conclusively determined by the High Court (which was a court of competent jurisdiction), that is between himself and DASPA?

[54] Having reviewed the facts as litigated between these same parties, I have doubt that the judgment of Justice Thomas creates an estoppel. I would go further and say that it would be an abuse of the process of court to allow Mr Ambo to relitigated the issue as to whether he was unfairly dismissed and whether or not he should be reinstated to his position, as it is this very same issues which has already been investigated and for which there has been a finding made by the learned trial judge and a judgment granted in favour of Mr Ambo.

[55] I ask the question whether it would be in the interest of justice and public policy to allow Mr Ambo in all the circumstances of this case to relitigated his dismissal. In my judgment I think not. Ambo cannot now try again before a different tribunal to obtain a separate and different verdict based on the same issues and facts. Not

only would this require the same parties to relitigated matters twice which have been thoroughly canvassed and investigated and decided in his favour but there is the risk that it can be inconsistent verdicts being reached.

[56] Public Policy requires that there should be an end to litigation and a litigant should not have to be vexed or troubled more than once in the same cause.

[57] Mr Ambo had the right to appeal the decision of Mr Justice Thomas which he chose not to do. He in fact accepted that judgment and filed a notice of satisfaction having received and accepted payment of damages awarded to him. Any attempt by him to relitigated this issue or matter which is what his application before the Tribunal and the appeal in the case at bar amounted to is to be disallowed under the doctrine of issue estoppel *per res judicatam* and the rules against the abuse of process of court.

[58] I therefore conclude that the doctrines of *res judicata* and issue estoppel are applicable to the case at bar and that the issues have been thoroughly litigated between the parties herein and decided on.

[59] Accordingly, the Tribunal decision was a correct and right one and in all the circumstances of this case should be

upheld. Therefore this appeal fails and is dismissed with costs to the respondents in the sum of \$5,000.00.

[60] I wish to thank Counsel for their assistance rendered to the Court in this matter and to apologise for the length of time that it has taken me to render my decision. However Counsel is well aware of the constraints experienced by the Court in that the original file was unfortunately misplaced in the chaos caused by the passage of Hurricane Maria which ravaged Dominica in September 2017 and only came into the hands of the judge in October 2018.

M E Birnie Stephenson
High Court Judge

[SEAL]

By the Court

Registrar