

EASTERN CARIBBEAN SUPREME COURT

COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. DOMHCV2002/0336

BETWEEN:-

[1] GILDON RICHARDS

Claimant

and

[1] ATTORNEY GENERAL OF THE COMMONWEALTH OF DOMINICA

[2] THE PRIME MINISTER, THE MINISTER OF FINANCE

[3] THE COMMISSIONER OF POLICE

[4] THE POLICE SERVICE COMMISSION

Defendants

Appearances

Mr J Gildon Richards Pro Se

Mrs Tameka Hyacinth Burton Solicitor General for the Respondents

2018, February 26

[1] **STEPHENSON, J.:** This is the determination of judgment being made pursuant to Order of the Court of Appeal dated 6th October 2009.

BACKGROUND

[2] This matter is a long outstanding one that has been dealt with by Judges and Masters of this Court and by the Court of Appeal.

[3] On the 20th December 2003 following the grant of leave the Claimant filed Judicial Review proceedings challenging a decision made to compulsorily retiring him from the Commonwealth of Dominica Police Force which decision was to take effect on the 1st May 2002.

- [4] The Claimant by this action sought a number of Declarations, an Order of Certiorari, general damages, special damages, exemplary damages, Interest and Costs. The Respondents never filed an affidavit in response in defence of the claim.
- [5] There is therefore no dispute offered by the Respondents as it regards the Claimant's entitlement to judgment in this matter as there is no evidence of them filing a defence in the matter or of them placing any evidence before the Court refuting or challenging the Claimant's evidence.
- [6] The Claimant is therefore entitled to judgment based on his claim. The question concerning the Court at this time is what are the terms of the judgment that is to be granted. This is a claim for Judicial Review or Administrative Order. What are the terms of judgment which the Claimant is entitled to in the face of failure on the part of the Defendant to file a defence and where there has been no trial?

DECLARATORY JUDGMENTS

- [7] I have decided to make some of the declarations sought by the Claimant without there being a trial or indeed any arguments on the merits of the case at bar for reasons stated below. Firstly it is trite law that the granting of declarations are within the Court's discretion.
- [8] The general rule is that the court will only grant a declaration after hearing argument and that declarations will not be made merely because the parties consent to it. ***Wallersteiner v Moir*¹**.
- [9] It has been held that this however, is not hard and fast rule and generally speaking a Court will make such an order where it seems right so to do. It is appreciated and acknowledged that this Court ought to proceed with caution in considering making such declarations.
- [10] The balance of justice between the parties has to be weighed. It is also noted that in furtherance of the Overriding Objective of the Civil Procedure Rules² doing justice to the parties is of primary importance. This Court in pursuance of the Overriding Objective encouraged the parties to compromise and settle their dispute rather than go to trial and fight to the bitter end.

¹[1974] 3 All ER 217, [1974] 1 WLR 991

²CPR 2000 Part 1.1

[11] In the case at bar the Court is also cognisant of the fact that the declarations which are to be made are based on the Claimant unproved averments.

[12] The Defendants in their sole affidavit filed in this case stated the amounts of monies that the Claimant is entitled to. These calculations were in fact based on the Claimant's loss of earnings that he would have been entitled to had he remained in active service in the Commonwealth of Dominica Police Force.

[13] This court is persuaded the decision in **Hayim –v- Couch**³ and by the four propositions given by Mr Justice Stephen Smith QC in that case given after he reviewed decisions touching and concerning the granting of declaratory judgments without trial and or arguments. Justice Smith QC said that he derived the following four propositions from the authorities that he reviewed:

“(1) That the rule that a court should not grant a declaration except after a trial was only ever a rule of practice.

(2) That the rule should not be followed if following it would deny the Claimant the fullest justice to which he is entitled.

(3) That the rule is less strong since the coming into force of the Civil Procedure Rules than it was when the Rules of the Supreme Court held sway.

(4) That where the parties' consent to (or agree not to oppose) the grant of declaratory relief and that consent forms part of a bona fide commercial bargain entered into between them to avoid the need for a trial, the court is likely to consider it necessary to grant the declarations sought in order to do justice between them.”⁴

[14] In **Hayam –v- Couch**⁵ the parties arrived at a binding contractual agreement and the Court in that matter held that where the parties have reached a binding commercial agreement to dispose of the relevant claim without a trial, the court will first have to be satisfied that:

1. The claim which has been compromised was seriously arguable;

³[2009] EWHC 1040

⁴Hayam et al –v- Couch op cit at paragraph 17

⁵Op cit

2. If the claim had succeeded at trial, the court would have been likely to have considered that the declarations sought were necessary to afford justice to the applicant; and
3. The grant of the declaratory relief sought was not likely to have any adverse repercussions for third parties⁶.

[15] I pause here to say that it is noted that the parties in the case at bar have not come up with a bona fide commercial bargain however, the Defendants have filed an affidavit⁶ stating the calculation of monies due and owing the Claimant if he had remained in the Commonwealth of Dominica Police Force unto January 26th 2013 when he would have arrived at the age of retirement, his retirement benefits and payments which would have been made to him lieu of vacation leave. The Claimant has placed on record his agreement and acceptance of the figures provided. Thereby signalling to the Court that a consensual position on the compensation claimed was arrived at thereby avoiding a need for trial on the claim.

[16] Weighing the balance of justice between the parties in this case and having regard to the Claimants case and the decision of the Court of Appeal in **The Attorney General of the Commonwealth of Dominica –v- Miriam Williams, Philbert Bertrand and Edward Etinoffe**⁷ as referred to by the Claimant in his Affidavit and the law upon which the Claimants' case rested, this Court is satisfied that the Claimant had a seriously arguable case and he had a clear prospect of success and in this Court's view it is very likely that the Court would have made some of the Declarations sought.

[17] This Court is also of the view that the grant of the Declaration is not likely to have any adverse effect and repercussions on any third parties.

[18] Therefore in all the circumstances of the case this Court will make the following declarations in determining the terms of the judgment herein:

1. That the Decision to retire the Claimant from the Commonwealth of Dominica Police Force made on the 25th day of April 2002 was ineffectual null and void in that there existed no lawful jurisdiction and or authority to retire the Claimant on the ground that he had served for a period of twenty (20) years.

⁶Affidavit of Assistant Superintendent Antonia Moses dated the 15th May 2017 and filed on even date

⁷Civil Appeal No 13 of 2003 (Commonwealth of Dominica)

2. That the purported compulsory retirement of the Claimant pursuant to section 8 of the Police Pensions Act⁸ was unlawful pursuant to Sections 92 and 121 (9) of the Constitution of the Commonwealth of Dominica. That the Claimant in the circumstances of this case could only have been made to retire on the specified date of his attaining the age of sixty (60), that is, on the 26th January 2013;
3. That the Claimant having been made to compulsory retire when it was illegal so to do de facto remained a member of the Commonwealth of Dominica Police Force and entitled to all such remuneration and benefits that he would have been entitled to as a Sergeant had he remained in active duty up until the 26th January 2016;
4. That the claimant is entitled to an award of compensation for his losses he suffered from having been purportedly unlawfully retired.

COMPENSATION TO BE AWARDED

[19] Judgment was entered in favour of the Claimant on the 5th day of May 2007 and the Claimant is therefore entitled to Judgment Interest from that date to the date payment pursuant to the provisions of the Judgements Act⁹ at the rate of 5% per annum.

[20] Pursuant to order of Court dated 10th March 2016, the Defendants were ordered to file and serve an affidavit stating the Claimant's entitlement as to salary, gratuity, social security, accrued vacation leave and allowances and how these entitlements were to be calculated and paid.

[21] On the 15th day of May 2016 the respondents filed and served the affidavit with the information as ordered. The Claimant informed the Court at a hearing of the matter and placed on record, that he had no objections to the calculations and the amounts as stated in the said affidavit and exhibits sworn to by Antonia Moses Assistant Superintendent of Police and officer in charge of the Administration Section of the Commonwealth of Dominica Police Force.

⁸ Chapter 23:81 of the Revised Laws of Dominica

⁹ Chapter 4:70 of the Revised Laws of Dominica

[22] I have examined the affidavit and the exhibits mentioned above and note that the calculations as stated which have been accepted by the Claimant are as follows:

A: Salary and Allowances (For the period May 2002 to January 2013)

1. Total Salary to be paid	\$415,059.54
2. 5% Interest per annum on Salary	\$186,776.80
3. Total Allowances (Special duty, Plain Clothes)	\$ 99,925.81
4. 5% Interest per annum on Allowances	\$44,966.61

B: Balance of Gratuity due and owing	\$29,649.13
5% Interest on Gratuity owing	\$13,342.11

C: Payment in Lieu of 430 days Vacation Leave	\$53,109.27
5% Interest on the payment in lieu of Vacation Leave	\$23,899.17

[23] Based on the calculations presented by the Defendants the Claimant is entitled to Monthly Pension in the sum of \$1,786.91 from the 27th February 2013. The Pension owing to the Claimant up to the end of February 2018 would be \$85,771.68.

[24] In the case at bar based on the calculations presented in the affidavit of Assistant Superintendent Moses A. the figures represent the gross payments of what the Claimant would have received from the time he was compulsorily retired to the date that he would have had to retired in the normal scope of things. The figures presented to this Court, represent the gross earnings of the Claimant which he was denied. In the **Mavis Williams** matter the Court of Appeal held that the correct approach in matters such as these would be for the gross amount to be reduced by deducting from it the amount that should have been paid as income tax.¹⁰

¹⁰DOMINICA CIVIL APPEAL No.20 Of 2005 Dominica Agricultural And Industrial Development Bank –V- Mavis Williams

[25] In the **Williams Case** the Court of Appeal applied the decision of the Barbadian High Court in the case of **Waithe –v- Caribbean International Airways Ltd.** ¹¹The **Waithe Case** in fact applied what is known as the **Gourly Principle** which was derived from the decision in **British Transport Commission –v- Gourly**¹².

[26] In **Gourly** it was held that in cases where the Court is awarding a claimant such money that will put him in the same position as he would have been had he not been terminated that the award should be made net of an amount that would reflect the deductions that would have been made for tax and national insurance in arriving at the settlement figure. In his judgment Earl Jowitt held that (a) the tax liability was not too remote to be ignored by the courts and (b) ...”to ignore the tax “would be to act in a manner which is out of touch with reality”¹³.

[27] Applying therefore the “Gourly Principle” it is safe to say that a sum should be deducted from the amounts to be paid in respect of income tax which would have been payable by the plaintiff on the emoluments which he would have received had he continued in the service of the Commonwealth of Dominica Police Force¹⁴;

[28] Pursuant to section 7(1) of the Income Tax Act¹⁵ “Tax shall be charged for every year of assessment on chargeable income of every person for that year. Section 8(1) (a) of the Income Act provides for the scope of tax in that were a person is resident his assessable income is on all amounts ascertained in accordance with part V accrued directly or indirectly from all sources whether in or out of Dominica which is not exempt from Tax as is provided. Part 33 of the Act states that the assessable income of any person shall include the gains or profits from or by the way of any employment.

¹¹(1988) 39 WIR 61

¹²1956 1 AC 185

¹³Ditto at page 203

¹⁵Chapter 67:01 of the Laws of the Commonwealth of Dominica

[29] It is clear from the provisions of the Income Tax Act and following the Court of Appeal decision in the **Mavis Williams Case**¹⁶ that the loss of income component of the judgment would be liable to be taxed. That is the gross amount.

[30] In the normal course of events, the tax on the salary would be fully collected through the system of collecting Income Tax by the department of Inland Revenue. It is noted that tax rules apply to compensation, or sums paid under a compromise agreement such as the one in question excluding interest.

[31] Further, Social Security Payments would have had to be made on behalf of the Claimant had he not been unlawfully retired. The amount owing to The Dominica Social Security based on the calculations presented by the Defendant is \$45, 919.63 to be paid as follows: The Defendant will have to make their share of the Contribution and the Claimant his share.

- i. . The employee's contribution would have been \$16,088.27(which is to be deducted from the compensation to be paid to the Claimant);
- ii. The employer's contribution would have been \$29,831.36.

[32] Judgment was entered in favour of the Claimant on the 5th day of May 2007 and the Claimant is therefore entitled to Judgment Interest from that date to the date payment pursuant to the provisions of the Judgements Act¹⁷ at the rate of 5% per annum and in the circumstances of this case Judgment Interest continues to accrue on the amounts owed to the Claimant up until the date of payment.

COSTS

[33] I now turn to the issue of Costs. There has been no agreement as to costs between the parties herein at this point. There were very brief discussions before the Court in this regard.

[34] The Claimant Mr Richards is a lawyer who in this matter represented himself. He has succeeded in his claim. Mr Richards urged this Court to make an award of Costs in his favour, based on the length of

¹⁶Op cit

¹⁷ Chapter 4:70 of the Revised Laws of Dominica

time this matter has been in the system that is how long it has been since he filed his matter and the time that a conclusion has been arrived at. The Court notes that this matter commenced in 2002 and is only now coming to a close in 2018 some sixteen years after it commenced.

[35] The matter has the history of engaging the High Court at every level in that it has engaged the attention of the Master, a Judge at first Instance, the Court of Appeal and once again a Judge of first instance for final judgment.

[36] The Defendants urged the Court not to make an award of costs and contend that it is the Defendants who did the bulk of the work to bring the matter to its conclusion. Further that the Claimant is receiving substantial compensation in the matter.

[37] Learned Counsel Mrs Hyacinth Burton drew the Court's attention to the provisions of the CPR that are relevant to the issue of costs. The Court informed Counsel that it would consider the whether or not costs should be awarded and included it in the judgment.

[38] It is noted that the Claimant who is a lawyer represented himself. It is also noted that in the substantive matter the Defendants did not file a defence or in fact they mounted no defence to the claim whatsoever. The Defendant's however participated in the arriving at the quantum of compensation which should be paid to the Claimant. In fact it is noted that it is the Defendants who provided the Court with the information solely and the Claimant accepted the figures presented.

[39] It is important that the Judge ensures as far as possible that there is procedural fairness afforded to all parties appearing before the Court. The principle of Law upon which the determination of costs is to be made is primarily regulated by the Civil Procedure Rules. For Costs to be payable there must be an order for costs made.

[40] The case at bar was proceeded pursuant to Part 56 of the CPR as an Administrative Action. Part 56.13 (4) provides that "*The judge may, however, make such orders as to costs as appear to the judge to be just ...*". Costs clearly are therefore clearly within the Judge's discretion.

[41] As a general rule “costs follow the event” and a successful party is generally entitled to his costs¹⁸. In the case at bar, the Claimant is undoubtedly the successful party and therefore should have a reasonable expectation to be awarded costs.

[42] If the Court is inclined to award costs to a successful party in Judicial Review Proceedings such an order must be made pursuant to Part 56.13(4). Those costs must be assessed pursuant to rule 56.13(5) which directs the Court to parts 65.11 and 65.12 of CPR 2000.

[43] Having considered the facts and all the circumstances of this matter it is this Court’s decision that the Claimant is entitled to his costs and therefore this Court’s order is that the Mr Richards is to have his costs to be assessed if there is no agreement in this regard within 21 days of this order.

[44] Judgment is therefore entered in favour of the Claimant in the following terms:

1. It is hereby declared as follows:

- a. That the Decision to retire the Claimant from the Commonwealth of Dominica Police Force made on the 25th day of April 2002 was ineffectual null and void in that there existed no lawful jurisdiction and or authority to retire the Claimant on the ground that he had served for a period of twenty (20) years;
- b. That the purported compulsory retirement of the Claimant pursuant to section 8 of the Police Pensions Act¹⁹ was unlawful pursuant to Sections 92 and 121 (9) of the Constitution of the Commonwealth of Dominica. That the Claimant in the circumstances of this case could only have been made to retire on the specified date of his attaining the age of sixty (60), that is, on the 26th January 2013;
- c. That the Claimant having been made to compulsory retire when it was illegal so to do de facto remained a member of the Commonwealth of Dominica Police Force and entitled to all such remuneration and benefits that he would have been entitled to as a Sergeant had he remained in active duty up until the 26th January 2013;
- d. That the Claimant is entitled to an award of damages that compensates his losses he suffered from not having been compulsorily retired in accordance with the provisions of

¹⁸ Part 64.6(1) of CPR 2000

¹⁹ Chapter 23:81 of the Revised Laws of Dominica

the Constitution of the Commonwealth of Dominica which is to say upon his attaining the age of 60 years on the 26th January 2013

2. An order certiorari is granted quashing the decision to retire the Claimant from the Commonwealth of Dominica Police Force made on the 25th day of April 2002;
3. That compensation in the sum of \$ 1,054,205.51 is awarded to the Claimant less income tax which is to be assessed on the sum of \$568,984.62 being the total loss of salary, allowances, and payment in lieu of vacation leave for the period May 2002 to January 2013. Income tax is to be assessed by the Inland Revenue Department. *Ex Abundante Cuatula* the calculation of the taxes is to be calculated on the emoluments to which the Claimant was entitled solely.
4. Interest on the sum of \$683,515.43 at the rate of 5% per annum from the 8th March 2018 to the date of payment at the daily rate of \$93.63.
5. The sum of \$16,088.27 is to be deducted from the payments to be made to the Claimant and paid to The Dominica Social Security on behalf of the Claimant, and that the Defendants are also to pay the sum of \$29,831.36 representing their contribution on behalf of the Claimant.
6. The Claimant is to have his costs to be assessed if there is no agreement within 21 days of this order.

[45] The Court wishes to express its appreciation to Counsel for their assistance in completing this judgment and recognising the fact that the parties herein have substantially settled this long outstanding matter.

M E Birnie Stephenson
High Court Judge

[SEAL]

BY THE COURT

REGISTRAR