

COMMONWEALTH OF DOMINICA
THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO DOMHCV 2009/0238

BETWEEN:

CLIFTON LEWIS

Respondent /Claimant

AND

THE ATTORNEY GENERAL OF THE COMMONWEALTH OF DOMINICA

Applicant/Defendant

Appearances:

Ms Tameka Hyacinth for the Applicant/Defendant

Mr David Bruney for the Respondent/Claimant

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2011: February 28;

2012: March 29

.....

Decision

Introduction and background

[1] LANNS, M: Pending before the court is an application by the Defendant for an order striking out the Claimant's Statement of case as disclosing no reasonable ground for bringing the claim.

[2] Clifton Lewis was appointed to the Public Service on 1st July 1989 in the position of Fire Officer. This appointment did not last very long, for on November 11, 1991, while on duty, Mr Lewis fell off a fire truck and sustained injury to his lower back and pelvis. After numerous periods of sick leave, Mr Lewis was eventually medically boarded off by letter dated 3rd February 1995. The letter informed and certified that the Medical Board had examined Mr Lewis and found him to be suffering from infirmity of mind/body which rendered him incapable of discharging his duties. The Medical Board also opined that Mr. Lewis' infirmity was likely to be permanent.

[3] By letter dated 3rd March 1995, the Public Service Commission (the PSC) informed Mr Lewis that he had been medically boarded off from the Public Service with effect from 3rd February 1995.

[4] It is said that Mr Lewis was not entitled to a gratuity, because he had not worked for 10 years. However, with the intervention of his Union, Mr Lewis was eventually paid a compassionate gratuity in the amount of \$7000.00.

[5] It appears that in the year 2006, Mr Lewis, upon recommendation, further submitted to examination before a Medical Board. The Board found that Mr Lewis was no longer suffering from any infirmity.

[6] On 15th June 2007, Mr Lewis through his original solicitors Letang & Ducreay, filed an application for leave to apply for Judicial Review against the Attorney General of the Commonwealth of Dominica and the PSC as Respondents, to quash the decision of the PSC, made on 3rd March 1995 to medically board him off from the Public Service. He also sought an order of mandamus for the PSC to restore him to his substantive position in the Public Service.

[7] The legal grounds were stated as

(1) Breach of General Orders of the Public Service, Illegality, procedural impropriety, irrationality, and breach of legitimate expectation;

(2) General Orders procedures in respect of medically board off were not observed; 3

(3) Alternatively, the decision was irrational because the appropriate authority failed to take into account relevant considerations in arriving at the decision;

(4) The decision ignored the rules of Natural Justice and the legitimate expectation of the applicant

[8] According to an endorsement on the file Docket the application for leave to apply for judicial review came before Baptiste J on 2nd July 2007 in open court, and the application was refused. It appears that no formal order was drawn up for sealing. There is none on the file. No appeal was lodged against the decision.

[9] On 30th June 2009, Mr Lewis brought this action against the Attorney General of Dominica for wrongful dismissal. He had now retained new counsel.

[10] By an Amended Statement of Claim, Mr Lewis pleads among other things that he was employed as a fireman for 20 years and gave loyal and exemplary service during that period. The Amended Statement of Claim alleges that by correspondence dated 3rd March 1995, the PSC purported to medically board him off with effect from 3rd February 1995. Mr Lewis pleads that by correspondence written by the Defendant's Solicitor dated June 6th 2000, the PSC was informed that such medical board off was without lawful justification, as there had been no medical recommendation that he should be medically boarded off. He claims that as a consequence of such unlawful medical board off, he had been deprived of income and benefits to which he was lawfully entitled as a public servant.

[11] In his prayer for relief, Mr Lewis prayed for

(1) Unpaid salary for the period 1995 - 2007 = \$266,000.00

(2) Damages for wrongful dismissal

(3) Special damages of \$266,000.00 being unpaid salary consequent upon his being unlawfully medically boarded off.

(4) Costs 4

[12] By way of Amended Defence, the Defendant denies that the Claimant was employed as a Fire Officer for 20 years. The Defendant avers that Mr Lewis was employed for 16 years. The Defendant further avers that the medical board off was lawful and that Mr Lewis received full compensation in respect thereof. The Defendant further avers that any challenge to the lawfulness of the medical board off is statute barred. The Defendant says that on 28th February 2008, the PSC wrote to Mr Lewis informing him that he was appointed as Fireman (Temporary) from March 1, 2008 to June 30th 2008; and that such appointment was not a continuation of the Claimant's previous employment as a Fire Officer.

[13] In his Reply, Mr Lewis avers that there was no evidence on which the medical board could have drawn a conclusion that Mr Lewis should be boarded off. The Board made the decision to board off Mr Lewis without the necessary assessment and consultation, Mr Lewis alleged. Mr Lewis asserts that the Public Authorities Protection Act was for a body which intended to do right within the jurisdiction, but by mistake went wrong. Consequently, says Mr Lewis, medically boarding him off without the requisite procedure, created a nullity. According to Mr Lewis, his employment could not have seized as a consequence, and as such he continued to be employed as at 1st March 2008. In other words he was employed as a Fireman from 1989 - the date of his appointment as a Fireman to June 2008 when he seized employment as a "Temporary" Fireman.

[14] This matter had progressed to the stage of directions for trial when the Defendants filed the present application before the court for an order striking out Mr Lewis' Statement of Case as disclosing no reasonable ground for bringing the claim.

[15] The grounds of the application are stated to be:

1. No material facts are pleaded in the Statement of Claim which support, or are capable of disclosing a cause of action; 5

2. The Amended Statement of Claim and Reply filed on 11th May 2010 and 25th June 2010 respectively are misconceived and do not disclose any reasonable ground for bringing the claim in that

(a) The claim purports to be based on an alleged wrongful dismissal which took place in 1995 and as such is statute barred;

(b) The employment of the claimant in 2008 was for limited periods and for fixed duration and that such employment came to an end by effluxion of time;

(c) In an action for wrongful dismissal the Court cannot declare a dismissal a nullity but can only award damages if it finds that the dismissal was wrongful.

3. The Claim is an abuse of process of the court in that:

(a) The Claimant failed to inform the Court that on June 15th , 2007 he applied for leave to apply for judicial review to quash the decision of the Public Service Commission to medically board him off and for an order of mandamus to restore him to his substantive position in the public Service; and that such application for leave was heard in open court and refused on July 3rd 2007;

(b) The Claimant has failed to plead the necessary material facts to establish a claim for wrongful dismissal.

The Submissions 6

[16] The Defendant submits that a claim issued after the limitation period is an abuse of process. The Defendant contends that the cause of action pleaded is wrongful dismissal yet the claimant is challenging the dismissal on medical grounds.

[17] The Defendant further contends that a claim for wrongful dismissal is a claim in contract. The limitation period for claims based on simple contracts is six years from the date on which the cause of action arose.

[18] The Defendant submits that it is an abuse of process for Mr Lewis to litigate an identical issue which had already been decided against him in earlier proceedings even though the matter may not be strictly res judicata. The Defendant further submits that Mr Lewis' claim that the medical board off was unlawful and a nullity is an abuse of process of the court since the Claimant had already applied for leave to apply for judicial review in relation to that issue and leave was refused leave. According to the Defendant's counsel, Mr Lewis is effectively asking the court to adjudicate on the question whether the decision of the medical board him was a nullity.

[19] On the question as to whether Mr Lewis has pleaded the necessary facts in his claim for wrongful dismissal, Ms Hyacinth submitted that Mr Lewis has only pleaded facts to establish that he was employed by the State from March 1 2008 to June 30, 2008. In counsel's view, Mr Lewis has failed to plead facts to satisfy even the first element of a claim for wrongful dismissal namely that the fixed period of employment was terminated before the expiration of the period. Counsel posited that a claim for wrongful dismissal requires the existence of a lawful contract which Mr Lewis must plead was breached.

[20] In resisting the submissions of the Defendants, Mr Bruney, learned counsel for the Mr Lewis was adamant that the claim is not statute barred in relation to Mr Lewis. Counsel placed heavy reliance on the Public Authorities Protection Act which provides that "the action, prosecution or proceeding shall not lie or be instituted unless it is commenced within six (6) months next after the ceasing thereof." Counsel contends that that provision specifically legislated for the benefit of the Defendant in the matter of limitation of actions. 7

[21] Counsel then adverted to the provisions of S. 26 of the State proceedings Act Chapter 7:80 which provide that "Nothing in this Act shall prejudice the right of the State to rely upon the law relating to the limitation of time for bringing proceedings against public authorities." Counsel submits that the State is bound to the use of S.2 (1)(a) of the Public Authorities Act. If the court allows the State to utilize Section 5 of the Limitation Act 1980 (UK), this would be tantamount to a repeal by this court of S. 2(1)(a), of the Public Authorities Protection Act, submitted Mr Bruney. I understand Mr Bruney to be saying that it is impermissible for the Defendant to rely on S. 5 of the Limitation Act against Mr Lewis and that the applicable legislation to be utilized by the Defendant is S.2 (1)(a) of the Public Authorities Act in respect of Limitation Proceedings.

[22] Next, counsel referred to paragraph 4 (ii) of the Amended Statement of Claim and submitted that the PSC deliberately chose to go outside its own jurisdiction by arbitrarily saying "We have the power to dismiss and we will ignore the regulations that require the use of a valid medical report."

[23] So far as Mr Bruney was concerned the PSC had no jurisdiction to dismiss Mr Lewis. For this submission, counsel relied on the case of *Public Service Commission v Davis and Others* (1984) 33 WIR 112. He quoted Robotham JA as saying: "The protection of the Act ... was for a body which intended to do right within the jurisdiction, but by mistake went wrong. Here the Commission deliberately chose to go outside its own jurisdiction by saying arbitrarily 'we have the power to retire and we will ignore the regulations. This he said put them beyond the protection of the Act ... I am of the view that in this case the Public Service Commission acted without jurisdiction when it purported to dismiss the Respondents ... therefore it is not entitled to the protection of the Public Authorities Protection Act."

[24] Based upon the Dicta of Robotham JA, Mr Bruney denies that it is open to the Defendant to rely on the prescribed limitation proceedings as a method of avoiding liability. 8

[25] As to the issue of judicial review, Mr Bruney contends that the Defendant failed to identify this subject matter in the Defence. If the Defendant intended to depend on the issue of the judicial review proceedings, it should have been raised in the Defence and failure to do so would negate its use at this stage of the proceedings, contended Mr Bruney.

[26] As to the Defendant's contention that Mr Lewis is asking the court to declare Mr Lewis' dismissal a nullity rather than asking for damages, Mr Bruney submits that Mr Lewis in his Reply contended that the termination was a complete nullity, but the remedy sought by him is reflected in the Statement of Claim as damages only.

[27] Mr Bruney concluded his submissions by a) giving a detailed exposition of the history of Mr Lewis' employment; b) stating his interpretation of correspondence between Mr Lewis and the PSC; c) drawing inferences as to why Mr Lewis was permitted to continue his duties as a Fireman; d) stating his view as to the true intention of the PSC when it reemployed Mr Lewis in 2008; e) stating his opinion as to the validity of correspondence from the Secretary to the Cabinet.

[28] Finally, Mr Bruney urged the court to consider the overriding objective of the Rules to do justice. In his view, an injustice had been done to Mr Lewis because he had been shut out from the proper procedure of the PSC. Damages should be awarded for such conduct, submitted Mr Bruney.

The Law

[29] The relevant legislation and procedural rules to be examined are

- (1) The Civil Procedure Rules 2000 rule 26.3;
 - (2) Civil procedure Rule 10.7 (1); and 9
 - (3) The Public Authorities Protection Act Chapter 5.13.
- (1) Civil Procedure Rule 26.3

[30] The power to strike out a pleading which does not disclose any reasonable ground for bringing or defending a claim is conferred by CPR 26.3(1) (b) which provides:- "26.3 (1) In addition to any power under these Rules, the court may strike out a statement of case if appears to the court that -

(a) there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings;

(b) that the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;

(c) that the statement of case is an abuse of the court's process or is likely to obstruct the just disposal of the proceedings; or

(d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10.

[31] In *Corporate Pacific Heritage (M) SDN BHD V MRP Resources Ltd - Claim No BVIHCV2002/0042* Rawlins J stated in paragraph 22 that it is only where a statement of case does not amount to a viable claim or defence, or is beyond cure that the court should strike it out. The ultimate judicial task is to ensure justice to all of the parties in all of the circumstances.¹⁰

[32] More recently in *Ian Peters v Robert George Spencer, Antigua and Barbuda Civil Appeal 2009/016*, the Hon Mde Janice George Creque, JA quoted the Hon Mde Ola Mae Edwards in *Citco Global Custody NV v Y2K Finance, BVI Civil Appeal No 22 of 2009* as saying:

"[18] On hearing an application made pursuant to CPR 26.3 (1) (b) the trial judge

should assume that the facts alleged in the statement of case are true. Despite

this general approach, however, care should be taken to distinguish between

primary facts and conclusions or inferences from those facts. Such conclusions or

inferences may require to be subjected to closer scrutiny."

"Among the governing principles stated in *Blackstone's Civil Practice 2009*, the

following circumstances are identified as providing reasons for not striking out a

statement of case: where the argument involves a substantial point of law which

does not admit of plain and obvious answer; or the law is in a state of

development; or where the strength of the case may not be clear because it has

not been fully investigated. It is also well settled that the jurisdiction to strike out is

to be used sparingly since the exercise of the jurisdiction deprives a party of its

rights to a fair trial, and the ability to strengthen its case through the process of

disclosure and other court procedures such as requests for information, and the cross-examination of witnesses, often change the complexion of a case. Also, before using CPR 26.3 (1) to dispose of 'side issues', care should be taken to ensure that a party is not deprived of the right to trial on issues essential to its case. Finally, in deciding to strike out, the judge should consider the effect of the order on any parallel proceedings and the power of the court in every application, must be exercised in accordance with the overriding objective in dealing with cases justly."

[33] I glean from *Citco*, that I am duty bound to apply the law governing applications to strike out. In so doing, I must assume that the facts as pleaded in the Statement of Claim are true. However, I am to distinguish between primary facts and conclusions or inferences 11 from those facts. Such conclusions or inferences may require to be subjected to closer scrutiny."

[34] Indeed, although the pleadings contain primary facts which must be taken at face value to be true for the purpose of this application to strike, there are many inferences and conclusions which require close scrutiny.

(2) CIVIL PROCEDURE RULE 10.7

[35] Rule 10.7 provides that the defendant may not rely on any factual allegation or factual argument which is not set out in the Defence. So in order for the Defendant to rely on the plea of limitation, it must be specifically pleaded. As can be seen from paragraph 6 of the Defence to the Amended Statement of Claim, the Defendant has complied with this provision.

(3) Public Authorities Protection Act

[36] The purpose of the Public Authorities Protection Act (the Act) is to protect public authorities. There is no dispute that the Attorney General (in the execution of his duties) is a public authority. The Attorney General is employed by the State and is paid by the Government of the Commonwealth of Dominica and as such she/he is entitled to the protection of the Act.

[37] Section 2 of the Act restricts the right of a person who is aggrieved by the actions of a public authority to bring his or her suit within six months of the date of the alleged offending action:

"2. Where any action, prosecution or other proceedings commenced against

any person for any act done in pursuance of or execution or intended

execution of any Act, or of any public duty or authority or of any alleged 12

neglect or default in the execution of any such Act, duty or authority, the

following provisions shall have effect:

(a) the action, prosecution or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of, or in case of a continuance of injury or damage, within six months next after the ceasing thereof."

[38] Section 26 of the Act gives the Defendants the right to rely upon the Act:

"26. Nothing in this Act shall prejudice the right of the Crown to rely upon the law relating to limitation of time for bringing proceedings against public authorities"

[39] A clear interpretation and effect of Section 26 of the Public Authorities Protection Act is given in the case of *Balteano Duffus v National Water Commission* (2007) UKPC Appeal No 13 of 2006. In *Duffus*, a claim was brought against a public authority for wrongful dismissal. One of the issues before the Judicial Committee of the Privy Council was whether the action was statute barred pursuant to the Public Authorities Protection Act. Lord Scott of Foscote, delivering the decision of the Privy Council said:

"The Court of Appeal dealt very shortly with this point. The cause of action for wrongful dismissal, upon which Mr Duffus was suing, accrued on 28th May 1990.

The action had not commenced until 9 March 1992. The interval was in excess of one year. So the action was barred by section 2 (1) of the Public Authorities Protection Act. Their Lordships agree...."

[40] This case falls squarely within the explanation of Lord Scott in *Balteano Duffus v National Water Commission* supra. 13

[41] Applying the dicta of Lord Scott in *Duffus*, the cause of action upon which Mr Lewis is suing accrued on 3rd February 1995, the date when his medical board off took effect. His services had been terminated when he was medically boarded off in February 1995.

[42] Mr Lewis therefore had six months from 3rd February 1995 to bring his action. He brought his action on 29th June 2009. The action had not been commenced within the time limited by the Public Authorities Protection Act. It has been caught by the strictures of the Public Authorities Protection Act.

[43] It might be relevant to cite the case of *Genevieve Joyce v Antigua Public Utilities Authority*, *Antigua and Barbuda High Court Civil Claim No. 112 of 1998*. In *Joyce*, supra, a claim in negligence was brought against a public authority for causing a power line to come down in the public side walk, thereby causing the death of a child by electrocution.

In its defence, the public authority pleaded the provisions of the Public Authorities

Protection Act, Cap 352. Mitchel J in the course of delivering his judgment stated thus:

"The meaning of the words of the statute in such an event is clear. Draconian and out of date with modern thinking as to the responsibility of public authorities to members of the public as the section is, the legislature has not seen it fit to remove it from our law as has been done in some other parts of the Commonwealth. The result is that the filing of the writ seven months after the death in this case was fatal. The claim will accordingly be dismissed."

[44] Likewise, the filing of the claim fourteen years after the termination is fatal. The Claim is accordingly dismissed.

[45] The court is of the opinion that having regard to its finding on the issue of limitation, it is not necessary for it to go any further, except to say that it is noted that Mr Lewis' claim is conspicuously silent on issue of the refusal of leave for judicial review. A close scrutiny of Mr Lewis' Statement of case show that although the substance of the claim relate to the alleged wrongful dismissal of Mr Lewis, Mr Lewis' Claim challenges the dismissal on the 14 lawfulness of the procedure by which he was medically boarded off. This, to me is an abuse of process in light of the fact that the application for judicial review was dismissed and there has been no appeal against the decision refusing leave to file an action for judicial review of the decision of the PSC to medically board off Mr Lewis.

[46] It is evident to me from a review /inspection of the filings that the issue of the procedure by which Mr Lewis was medically boarded off is a common denominator in both the pleadings in this case and in the application for leave for judicial review. As the issue of the medical board of was a common denominator in the application for leave for judicial review and the pleadings in case at bar, estoppel and or res judicata kicks in.

[47] To my mind, Justice Baptiste's refusal of leave was a clear rejection of the claim that the procedure by which Mr Lewis was medically boarded off was defective. For litigation to occur in relation to the medical board off, there must be an appeal against Justice Baptist's order, and that appeal must result in the setting aside of that order.

[48] When a court of competent jurisdiction has decided an issue between parties, the same issue cannot be re-litigated between them in the same court. The decision stands until it is reversed on appeal. (per Rawlins, J.A [Ag] in Bertha Compton qua Administratrix of the Estate of Macrina Blaze v Dr Christiana Nathaniel et al St Lucia Civil Appeal No 12 of 2004.

[49] In the circumstances, Mr Lewis must be estopped from pursuing a claim against the Attorney General for wrongful dismissal by virtue of him being medically boarded off in 1995 other than by way of an appeal. There being no appeal, his claim is liable to be struck out as an abuse of process.

Conclusion

[50] It is hereby ordered:

[1] That the Claimant's claim is struck out as being statute barred and as an abuse of process. 15

[2] Each party shall bear his own costs.

[50] I am grateful to both counsel for their very helpful submissions and authorities

Pearletta E Lanns

Master