



[2017] JMSC Civ 183

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015 HCV 04511

BETWEEN	TRILLIAN DOUGLAS	CLAIMANT
AND	THE COMMISSIONER OF POLICE	DEFENDANT

IN CHAMBERS

Mr William Panton and Mr Courtney Williams instructed by DunnCox for the Claimant/Applicant Respondent

Ms Tamara Dickens instructed by the Director of State Proceedings for the Defendant/Respondent

**Heard:** March 21, June 19 and November 17, 2017

APPLICATION TO STRIKE OUT CLAIM- ABUSE OF PROCESS – WHETHER REASONABLE GROUNDS FOR BRINGING CLAIM –RULE 26.3(1) (C) OF THE CIVIL PROCEDURE RULES (CPR) – APPLICATION FOR ORDER TO FILE DEFENCE OUT OF TIME – RULE 10.3(9) OF THE CPR

**LINDO J**

- [1] The Claimant was a member of the Jamaica Constabulary Force, having joined as a "probationary constable" in 2012.
- [2] The Defendant, the Commissioner of Police, is the person who by virtue of the Constabulary Force Act, has sole operational command and superintendence of the Jamaica Constabulary Force.

- [3] By way of Fixed Date Claim Form (FDCF) filed on September 21, 2015, the Claimant is seeking declarations, an order quashing the decision of the Defendant made on April 17, 2014 to dismiss her from the Jamaica Constabulary Force, damages, loss of salary and interest on damages, costs and "all necessary and consequential directions".
- [4] The FDCF is intituted "In the matter of the Constitution of Jamaica", "In the matter of an application by the Applicant alleging breach of her constitutional rights under Section 13 (l)(i) and Constitutional redress pursuant to section 19 of the Charter of Rights and Freedoms (Constitutional Amendment ) Act 2011" and "In the matter of an application by Trillian Douglas for Constitutional Redress pursuant to Section 19 of the said Chapter" and "In the matter of Regulation 24(6)(a) of the Police Service Regulations, 1961. It is supported by the affidavit of the Claimant filed on the same date".
- [5] On April 4, 2016 the matter came on for a first hearing and the court made orders for filing of further affidavits and a case management conference was set to be held on November 14, 2016. It is also on April 4, 2016 that the Defendant filed an Acknowledgement of Service, in which it was stated that service had been effected on January 25, 2015. The Defendant has denied the Claim and has stated an intention to defend it.
- [6] The court's records reveal that on December 5, 2016, Particulars of Claim was filed pursuant to an order of the court made on November 14, 2016. On February 10, 2017, the Defendant filed a Request for Information along with an Application to Strike out the Claim. This application is supported by the affidavit of Carla Thomas filed on February 13, 2017 and a Supplemental Affidavit filed on February 23, 2017. On March 16, 2017 the Claimant filed a Reply to Request for Information. On March 14, 2017 the Defendant filed an Application for Extension of Time to file Defence which is supported by the affidavit of Carla Thomas filed on March 21, 2017.

[7] The Claimant is opposing the Defendant's application to strike out the claim and on March 14, 2017, filed the affidavit of William Panton, attorney-at-law and Consultant with the firm DunnCox in that regard.

[8] The grounds stated in the application to strike out the claim are stated as follows:

- "1. Rule 26.3(1)(b) of the Civil Procedure Rules (The CPR) provides that the court may strike out a statement of case or part thereof, if it appears to the court that the statement of case or part to be struck out is an abuse of the process of the court;*
- 2. Rule 26.3(1) (c) empowers the court to strike out a Claimant's statement of case in instances where it discloses no reasonable grounds for bringing the claim;*
- 3. The Claimant under the guise of this claim is seeking to challenge the decision of the Commissioner of Police dated April 14, 2014, refusing to appoint her as a constable of police in the Jamaica Constabulary Force;*
- 4. Any challenge to the decision of the Commissioner of Police can only be made by way of judicial review;*
- 5. The Claimant sought leave to apply for judicial review on July 17, 2014 and the said application was refused by the Honourable Mr Justice Bertram Morrison on February 25, 2015;*
- 6. This claim in all the circumstances amounts to a flagrant abuse of the court's process; and*
- 7. The overriding objective favours the grant of the orders sought."*

[9] The basis of the application to strike out is that the claim sought to be struck out is in effect the same which was brought before the court in Claim No. 2014HCV 03461, and which was heard, *inter partes*, and was refused. The Defendant contends that the Claimant is seeking to impugn the decision of the Commissioner of Police refusing to appoint her to the post of constable and dismissing her from the Jamaica Constabulary Force (JCF) and that the claim amounts to an abuse of the process of the court.

[10] Ms Dickens noted that the Claimant is alleging that the decision of the Commissioner was unreasonable and that all the issues fall within the grounds

for judicial review as the Claimant was seeking to attack the manner in which the Commissioner carried out his function.

- [11] Counsel pointed out that in refusing to appoint the Claimant as a constable, the Commissioner would have been exercising an administrative function and therefore his decision is subject to judicial review. In support of this, she cited the case of **Corporal Glenroy Clarke v The Commissioner of Police and the Attorney General** (1996) 33 JLR 50 in which the Court of Appeal examined the role of the Commissioner of Police in the context of applications for re-enlistment and found, *inter alia*, that:

*"...when the Commissioner, as sole commander of the Force, considers the approval or not of an appointment for re-enlistment, he is exercising an administrative function..."*

- [12] She submitted that the same principle applies in relation to the Commissioner's decision whether to appoint a trainee constable as a constable of police and in such circumstances he is exercising an administrative function.

- [13] Counsel examined the function of judicial review as stated by Mangatal J in **Shirley Tyndall and Others v Justice Boyd Carey and Others**, Claim No. 2010HCV00474, unreported, delivered February 12, 2010 and submitted that the decision of the Commissioner was "squarely pursuant to his statutory powers established pursuant to the Constabulary Force Act and can only therefore be challenged by judicial review".

- [14] Counsel added that the role and function of the Commissioner of Police is established by statute and his powers to recruit and dismiss constables and other members of the JCF are governed by the Police Service Regulations 1961 and any challenge to the exercise of his powers under those instruments must be in the manner prescribed by law, "and ultimately by way of judicial review". She expressed the view that the claim would therefore amount to an abuse of process as brought under private law. For this submission she placed reliance on the following cases: **The Attorney General of Jamaica v Keith Lewis**, SCCA

73/05, unreported, delivered October 5, 2007 and **Loana Carty v The Chairman, Penwood High School's Board of Management C/O Principal and the Attorney General of Jamaica** [2016] JMSC Civ 83.

- [15] Ms Dickens pointed out that *certiorari* is exclusively a public law remedy and is only available on an application for judicial review. She noted that the Claimant is seeking an order to quash the order of the Commissioner of Police and loss of salary and in circumstances where, having been refused leave to apply for judicial review, the Claimant cannot now seek to bring her claim under private law. That, she indicated is an abuse of process.
- [16] Counsel also pointed out that the allegations of harassment are against specific persons, not against the Commissioner therefore it should be struck as there is no allegation as against the Commissioner, no cause of action disclosed against him and the pleadings disclosed no reasonable grounds for bringing the claim against the defendant.
- [17] On behalf of the Claimant, it was submitted that the hearing of the application for leave to apply for judicial review was not determinative of the substantive issues raised by the Claimant, as the court was concerned with "*locus standi*, the threshold test and whether there exists any discretionary bar such as delay and alternative remedy".
- [18] Mr Panton stated that the crux of the Claimant's case is being discriminated against by reason of being female and is pursuant to the **Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011** and that the cases cited by Counsel for the applicant all predate the Charter. He pointed out that the Claimant is seeking "declarations and order to quash, sought in the application for judicial review, which were not addressed in that application and also seeks damages on grounds of discrimination and loss of earning".
- [19] Counsel indicated that 'abuse of process' is not defined in the rules but has been explained in another context as "using that process for a purpose or in a way

significantly different from its ordinary and proper use" (*Attorney General v Barker* [2000] 1 FLR 759, DC).

[20] He quoted extensively from the decision in the case of *Dyson v Attorney General* [1911] KB 410, in which the English Court of Appeal addressed the court's power to strike out a claim and he stated that in relation to the contention that there was no cause of action disclosed against the Defendant, there is "an overwhelming amount of contemporaneous evidence in support of the Claimant's claim..."

[21] He submitted that the case cannot be described as incontestably bad and it is not a case where the first claim had been decided on its merit and suggested that it was inappropriate to strike out the claim in view of the circumstances.

#### **Application for extension of time to file Defence**

[22] The application for extension of time to file a defence is supported by the affidavit of Carla Thomas. The evidence is that instructions were received for the preparation of the Defence but were found to be incomplete, and as a consequence, the Defendant filed a Request for Information on February 10, 2017 to which the Claimant responded, and that response was received by the Defendant's attorney on March 17, 2017.

[23] The Defendant further states that more time is required to conduct additional investigations so as to respond to "all the allegations in the Claimant's claim".

[24] The Claimant has not filed a response to this affidavit and neither party placed any emphasis on this application, with Counsel for the Claimant simply pointing out that no Defence had been filed.

#### **Applicable law**

[25] The court's power to strike out statements of case is exercisable under its inherent jurisdiction and is also governed by rules of court.

[26] As stated by Lord Diplock in **Hunter v Chief Constable of the West Midlands Police**, [1982] AC 529 at 536 this is a power '*which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people*'.

[27] Rule 26.3(1) of the **Civil Procedure Rules, 2002** states as follows:

*"(1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –*

*(a).....*

*(b) that the statement of case or part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;*

*(c) that the statement of case or part to be struck out discloses no reasonable grounds for bringing or defending a claim."*

[28] In **Blackstone's Civil Practice, 2010**, the learned authors in commenting on Rule 3.4(2) (a) of the English Civil Procedure Rules, which is the equivalent of our CPR Rule 26.3(1) (c), state at paragraph 33.7 that:

*"Applications...may be made on the basis that the statement of case under attack fails on its face to disclose a sustainable claim or defence. Traditionally, this has been regarded as restricted to cases which are bad in law, or which fail to plead a complete claim or defence..."*

[29] In discussing the court's power to strike out pleadings, the learned authors of **Halsbury's, Laws of England, 4<sup>th</sup> Edition**, at paragraphs 430-435, stated, *inter alia*, that:

*"... the powers are permissive...and they confer a discretionary jurisdiction which the court will exercise in light of all the circumstances concerning the offending pleading...Where a pleading discloses no reasonable cause of action... it would be ordered struck out or amended, if it is*

*capable of amendment...No evidence including affidavit evidence is admissible on an application on this ground and since it is only the pleading itself which is being examined, the court is required to assume that the facts pleaded are true and undisputed...However, summary procedure... will only be applied to cases which are plain and obvious, where the case is clear beyond doubt, where the cause of action or defence is on the face of it obviously unsustainable, or where the case is unarguable...Nor will a pleading be struck out where it raises an arguable, difficult or important point of law."*

- [30] Where a statement discloses no reasonable grounds for bringing or defending it, it will be ordered struck out or amended, if it is capable of amendment. Rule 26.3 (1) (c) however, will only be applied to cases which are "plain and obvious, where the case is clear beyond doubt, where the cause of action or defence is on the face of it obviously unsustainable , or where the case is unarguable".
- [31] In **Johnson v Gore Wood & Co (a firm)**, [2002] 2 AC 149, Lord Bingham of Cornhill indicated that the approach to be adopted in assessing abuse of process should be a broad, merits-based judgment which takes into account the public and private interests involved, as well as the facts of the case. He also stated that it is not necessary before abuse is found, to identify any additional element, such as a collateral attack on a previous decision, or dishonesty, and noted that the presence of these elements will make the later proceedings more 'obviously abusive'.
- [32] Lord Kilbrandon, in giving the advice of the Board in **Yat Tung Investment Co. Ltd. v Dao Heng Bank** [1975] AC 581, at 590 noted that court has a duty not to deny a litigant his or her right to bring a claim before the court '*without scrupulous examination of all the circumstances*'.
- [33] Rule 10.3(9) of the CPR allows a defendant to make an application for an order extending the time for filing a defence. The rule does not contain the criteria to be utilized in the exercise of the power to extend time. However, if in the circumstances of the case, it is just and fair that the time for the filing of the



defence to be enlarged, the court in applying the overriding objective will grant such an order.

## **Discussion**

[34] The Defendant is contending that the present claim is an abuse of the process of the court and that there are no reasonable grounds for bringing the claim. The court is therefore being asked to examine the conduct of the Claimant in filing the instant claim. The Claimant on the other hand is asking the court to consider that the issues raised in the claim have not been litigated.

## **Abuse of Process**

[35] In considering the issue of whether the present claim is an abuse of process, I am guided by the authorities which show that a litigant ought not to be denied his or her right to bring a claim before the court "without scrupulous examination of all the circumstances".

[36] In the previous claim, the court had for consideration an application for leave to apply for judicial review. While it is clear that part of the claim as pleaded in the instant claim formed part of that claim which was previously before the court on the application for leave to apply for judicial review, additional claims now being pursued appear to be of a different jurisprudential nature as the instant claim involves, *inter alia*, claims for declarations that the Defendant discriminated against the Claimant "by reason of being a female", a declaration that she was dismissed "by reason of discrimination and harassment" and she is also claiming loss of salary and damages.

[37] The relevant question now is therefore whether it could be said that the Claimant is abusing or misusing the process of the court. The first claim in fact touched and concerned claims for declarations in relation to the question of "discrimination on the ground of being female" and "dismissed by reason of discrimination and harassment on the ground of being a female". The instant

claim is, however, in addition, seeking damages in relation to a claim for breach of the Claimant's constitutional rights and she is also claiming loss of salary.

[38] The relief sought in my view is based on a new cause of action which I find can properly be the subject of a fresh claim. However, I note that there is also a claim for "an order quashing the decision made on April 17, 2014 by the Defendant to dismiss the claimant from the Jamaica Constabulary Force on grounds that she was not likely to become an efficient member" which was, in effect, the basis of the application for leave to apply for judicial review which was refused.

[39] I bear in mind that abuse of process is capable of applying to cases where the first matter did not proceed to judgment, as suggested by Lord Millett in **Johnson v Gore Wood**. However, I believe it is important to note that the issues which would fall for determination were never raised in a trial and on the application for leave for judicial review, these issues were not adjudicated upon in the previous claim as that was an application for permission to pursue a claim.

[40] It is well established that striking out on the ground of abuse of process is a discretionary power and material consideration in exercising the discretion is the conduct of the parties so far. I am of the view that although there was an application for leave to apply for judicial review which was refused, and the Claimant is now seeking to enforce her private rights, which were not claimed in the application for judicial review nor were adjudicated upon, it would be in the interest of justice to allow her claim to proceed to be heard on its merits, with amendments, as necessary.

[41] I am guided by the decision in the case of **Overton Hutchinson v Victor Ellis Shepherd (Executor of the estate of Julia Burgher, deceased)**, (1991) 28 JLR 192, that the court has the discretion to permit a party to amend his pleadings even where no application for leave is before the court.

[42] In light of the fact that there was no trial in the first claim, I am of the view that it would be a draconian step to strike out the claim as being an abuse of process.

#### **No reasonable cause of action**

[43] The Defendant is contending that there is no cause of action disclosed against the Defendant. The issue to be addressed in relation to this ground is whether the Claimant can validly make a claim against the Defendant in respect of the allegations pleaded.

[44] The claim, as pleaded, clearly shows that the Claimant is seeking damages in relation to a claim for breach of her constitutional rights and she is also claiming loss of salary. The relief sought in my view is based on a new cause of action which I find can properly be the subject of a fresh claim.

[45] An examination of the pleadings, in my view shows that serious issues have been raised and these can only be properly determined at a trial on the hearing of the evidence. The statement of case as pleaded by the Claimant, in my opinion, could not be said to be 'obviously unsustainable' and neither is it 'unarguable'. In fact, if I understand correctly the gravamen of the Applicant's submission, the contention is not that the statement of case discloses no reasonable grounds for bringing a claim, but rather that there is no cause of action as against the named defendant and that the claim should be one for judicial review and an application for leave has already been refused.

[46] Having looked at the facts and circumstances of this case and examined the issues and allegations before the court in the claim, and having given careful consideration to the submissions of both Counsel, I will adopt the approach of the Court of Appeal in **Rudd v Crowne Fire Extinguishers Services**, SCCA 48/89, unreported, delivered December 20, 1989, where Downer JA, while making reference to the case of **Dyson v The Attorney General**, stated, *inter alia*, that:

*"...Even if the case is not a strong one, it merits an examination of the law and facts..."*

- [47] Additionally, I have considered, as Bingham and Millett LL stated in the case of **Johnson v Gore Wood**, that a court must hesitate, think deeply and carefully before turning away a litigant who has not had his claim heard on the merits. I therefore accept that striking out is a draconian measure which a court should be reluctant to take and should only take in the clearest of cases as the consequence is that a party who has had his claim struck out is barred from proceeding and find that the Claimant's statement of case discloses some cause of action and raises some questions fit to be decided by the court and it therefore ought not to be struck out.
- [48] I have also borne in mind that while the claim as filed are only allegations at this stage and could be completely cleared away at a trial, there is the need for a full hearing on the merits so it would be unwise to shut the Claimant out at this stage.
- [49] On the application to extend time to file a defence, I accept that the overall impact of a refusal or a grant of the application should be considered and this consideration should include any prejudice to either party.
- [50] On the affidavit evidence presented in support of the application, I accept that there is good reason proffered for the delay, as the Defendant had to seek instructions, filed a Request for Information and at the time of making the application, noted as a ground that the "Defendant is conducting investigations into the allegations". In an effort to balance the two competing rights to ensure that the litigation is fully pursued, I find that it would be just to permit the Defendant to file a defence although the time for filing same has long passed.

## **Conclusion**

- [51] The courts exist to adjudicate and determine disputes between parties and therefore litigants ought not to be denied the opportunity of having their issues decided on their merits by the court.

[52] In view of the foregoing, I find that it would be unjust in all the circumstances to strike out the claim as being an abuse of the process of the court and on grounds that it discloses no reasonable cause of action and find it is just and reasonable to allow the Defendant to file a defence at this stage so that the matter can be fully litigated.

### **Disposition**

[53] The claim for "an order quashing the decision made on April 17, 2014 by the Commissioner of Police to dismiss the Claimant from the Jamaica Constabulary Force on grounds that she is not likely to become an efficient member of the force" is struck out.

The Claimant is permitted to amend the claim to delete the reference to judicial review and to file and serve the amended claim on or before November 28, 2017

Permission is granted to the Defendant to file and serve a Defence within twenty eight days of the date of service of the amended claim.

The matter is to proceed to mediation on the filing of the Defence and a date for further case management conference is to be fixed, if the matter is not resolved at mediation.

Costs to be costs in the claim.

Leave to appeal is refused (if requested).

*Quashed*

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