



[2014] JMSC Civ.176

IN THE SUPREME COURT OF JUDICATURE

THE CIVIL DIVISION

CLAIM NO. 2014 HCV 01500

BETWEEN	OMAR GUYAH	CLAIMANT /APPLICANT
AND	COMMISSONER OF CUSTOMS	1st DEFENDANT
AND	CHIEF PERSONNEL OFFICER OF	2nd DEFENDANT
	THE SERVICES COMMISSIONS	
AND	ATTORNEY GENERAL OF JAMAICA	3rd DEFENDANT

IN CHAMBERS

Mr. Paul Beswick, Miss Carissa Bryan and Miss Georgia Buckley instructed by Messrs. Ballantyne, Beswick & Company for the Applicant/Claimant.

Miss. Althea Jarrett instructed by the Director of State Proceedings for the Defendants.

Present was Miss Jessica Belle, Senior Director of Human Resource Management and Development of the Jamaica Customs Agency.

Heard: 16th July 2014 and 31st October 2014

Injunction – Application to restrain the 1st and 2nd Defendants, from employing any person, to occupy the post of Director, Contraband Enforcement Team, Level 9 – Whether Injunction should be granted in the circumstances – Whether the Applicant has a legitimate expectation and right of entitlement to the post of Deputy Chief Executive Officer – Border Protection, Level 10 – Contravention of Section 13, Part 1(a) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 – Part 23 of the United Nation’s Universal Declaration of Human Rights – Application for Injunction refused – Declarations as prayed denied.

CAMPBELL J.

Background

- [1] The Applicant, Omar Guyah, holds the post Director (RMG/TA7), Contraband Enforcement, in the Jamaica Customs Agency. He was promoted to this position with effect, on June 1, 2010, while Jamaica Customs Agency was known as and operating as Jamaica Customs Department. On the 9th March 2012, the Applicant was arrested by the Revenue Protection Division (RPD) and was subsequently charged with breaches of section 210 of the Customs Act, breaches of the Corruption (Prevention Act), Conspiracy to Defraud and Simple Larceny.
- [2] The Applicant received a letter from the Ministry of Finance and Public Service on the 9th March 2012, advising that he was placed on interdiction due to allegations of unlawful disposing of assets held by Jamaica Customs contrary to the Customs Act.
- [3] An Application for an Interim Injunction was filed against the 1st and 2nd Defendants prohibiting them from filling the position of Deputy Chief Executive Officer. However, this Application was withdrawn because the position was subsequently filled. The Applicant has changed his application for an Injunction for the lower level position of Director, Contraband Enforcement Team, Level 9, for which a vacancy notice dated the 22nd May 2014 has been issued.
- [4] The Applicant has applied for the position and was advised that the selection process for the position would be held during July 18, 2014 to July 30, 2014. He is concerned that due to the pending criminal proceedings against him he will be deprived of his job. Consequently, by way of a Notice of Application for an Injunction, filed on the 14th of July 2014, the Applicant seeks the following orders, inter alia:
1. The time for service of this application be abridged to the time of actual service thereof;
 2. An injunction restraining the 1st and 2nd Defendants, their servants and/or agents and any person so connected to them, from taking any further steps whatsoever, to employ any person, to occupy the post of Director, Contraband Enforcement Team, Level 9 in the Jamaica Customs Agency, whether on a contract basis or otherwise, until the criminal proceedings against the Claimant have been concluded;

3. A declaration that the Claimant has a legitimate expectation and a right of entitlement to the post of Deputy Chief Executive Officer – Border Protection, Level 10, at the Jamaica Customs Agency should he be exonerated from the current criminal proceedings;
4. That damages be assessed against the Jamaica Customs Agency for filling the post of Deputy Chief Executive Officer – Border Protection, Level 10, whilst having full knowledge that the injunction application by the Claimant was ongoing in the Courts;
5. A declaration that the Claimant has been deprived of his Constitutional Rights under Chapter 3, Section 13, Part 1(a) of the Charter of Fundamental Rights and Freedoms; as well as Part 23 of the United Nation’s Universal Declaration of Human Rights.

The Applicant’s case

- [5] The Applicant asserts that he has been maliciously prosecuted for frivolous offences by the Revenue Protection Division, concerning fourteen (14) motor vehicles which were properly disposed of in keeping with the Customs Laws. The prosecution is baseless and without any merit and the Claimant is confident that the charges laid against him will be dismissed and determined in his favour.
- [6] His reputation, character and integrity have been seriously prejudiced and his prospects of securing future employment, in the law enforcement industry are thoroughly compromised.
- [7] The Applicant contends that he has legitimate expectation and a right of entitlement to the post of Deputy Chief Executive Officer – Border Protection, Level 10, by virtue of his qualifications, experience in Border Protection and outstanding track record. He also argues that the duties and responsibilities of the Level 10 post as detailed by the Office of Services Commissions is implicitly aligned to the duties that were being performed by him and meets all the requirement for the post and even supersedes the qualifications.
- [8] It was also argued that the Applicant’s constitutional right has been contravened. Section 13(1)(a) of the **Charter of Fundamental Rights and Freedom (Constitutional Amendment) Act, 2011**, states;

“Whereas, the state has an obligation to promote universal respect for, and observance of, human rights and freedoms;”

It was contended that having a job is a valuable asset and the act of advertising the position of Director, Contraband Enforcement Team, Level 9, was a deliberate act.

The Defendants' Case

- [9] Ms. Jarrett in her submissions highlighted that the position that the Applicant was seeking to secure was not automatic or guaranteed. There is a selection process involved and thus the position was open to competition. Therefore, no one has a right to that position. She further asserts that all the employees by virtue of the Human Resource Transition Policy Framework (hereinafter the "Policy") are aware of this. It was argued that, Mr. Guyah is aware of this and thus his reason for submitting an application. Again, there is no right, no legitimate expectation and no specific assurance given for the Level 10 position. The position was never promised or represented to the Applicant.
- [10] The Defendants assert that the operation of the government will be stymied if the injunction were to be granted. Additionally, there is another remedy available to the Applicant if he is concerned about the selection process for the Level 9 position. By virtue of Appendix 2, in the Policy, the Applicant has the right of appeal to the Public Service Commission if he is exonerated from the criminal charges.
- [11] The Applicant has made a veil reference to the breach of the Charter of Fundamental Rights and Freedom (Constitutional Amendment) Act, 2011. Section 13(1)(a), counsel contends is the preamble and the rights as guaranteed comes later in subsection 2.
- [12] The Defendant submits that the Court has no jurisdiction to grant an interim injunction by virtue of Sections 16(1)(a) and 16(2) of the **Crown Proceedings Act**. It was posited that it is clear that by joining the Attorney General as a party to this action, the Applicant has acknowledged that the proceedings are instituted against the Crown. Also section 13 of the **Crown Proceeding Act** states that any proceedings against the Attorney General are proceedings against the Crown.
- [13] The Defendants further argued that the Jamaica Customs Agency is a public body, hence an agent of the Crown. It was submitted that only in Judicial Review proceedings, the court may grant an injunction against the Crown. (See: **M v Home Office** [1993] 3 All E.R. 537 - *where it was held that the court has power to make coercive orders against the Minister of the Crown acting in their official capacity*).

- [14] It was also pointed out by counsel for the Defendants that the test for interim declaration and interim injunction is the same. In the case of **Caribbean Cement Company Limited v The Attorney General et al**, unreported decision of the Supreme Court delivered on the 16th July 2010; Marsh J, sets out the principle for interim declaration and quoted from **English Civil Procedure**, page 1035 (per Neil Andrews) at page 19 of his judgment, which states;

“Interim declaration should be granted only where the Claimant has a prime facie case... when considering the balance of convenience test, relevant factors and the strength of the Claimant’s case and the respective detriment to the parties should the interim declaration be granted or denied.”

Discussion

- [15] The Claimant holds himself up as an outstanding civil servant, who has garnered many a citation along the way for his outstanding achievements both locally and internationally. He has participated in many relevant courses and considers himself well qualified and suitable for certain positions, which have come about as a result of the Policy being undertaken to transform the Customs Department into an Executive Agency. His interdiction, on what he considers baseless charges that are being unduly drawn out, stands in the path of his career aspirations and he seeks for the process of filling the vacancies be stayed and restrained until the criminal matters pending against him are determined in his favour.
- [16] Counsel for the Defendants resists such an application for restraint, based on the process of transitioning the department. She contends that the authorities are against the grant of such injunctive relief against the Crown. The Claimant has no such legitimate expectation as claimed or entitlement to a post. In any event there is an alternative remedy provided for by way of appeal to the Public Service Commission. Damages are an adequate remedy, and the Claimant will be able to pursue his claims for false imprisonment and malicious prosecution.
- [17] Whether the court is permitted to grant an injunction or a declaration, the effects of either is not far-fetched. Against this background the court will consider the test which is applicable to either granting an interim injunction or interim declaration. In granting an injunction there are certain guidelines that the court must consider. These guidelines have been well established and enunciated in the case of **American Cyanamid Co. v Ethicon Limited** (1975) AC 396.

However, the Court of Appeal, in **Carib Ocho Rios Apartment v Proprietors Strata Plan No. 73 & Anor** (2013) JMCA Civ. 33, recently rehearsed the relevant principles on an application for the grant of an interim injunction. Therein the court examined **American Cyanamid Co. v Ethicon Limited** and the Privy Council decision in **National Commercial Bank Jamaica Limited v Olint Corporation Ltd.** [2009] 1 WLR 1405, where at paragraph 17, Harris JA said:

“there must be a serious issue to be tried; where there is a serious issue to be tried, if damages are an adequate remedy and they can be paid, an injunction should not be granted.” However there are cases in which serious triable issues are raised and a claimant could be adequately compensated in damages. In such circumstances, consideration should be given to the balance of convenience as to whether or not an injunction ought to be granted.”

- [18] The first hurdle is to determine whether there is a serious issue to be tried. Neither the Claimant’s written submissions nor his oral presentation deals specifically with the question as to whether there is a serious issue to be tried. The issue for trial is not the likely outcome of criminal proceedings that have been commenced against the Claimant. I am prepared to accept for the purpose of determining whether there are serious issues to be tried that the Claimant’s assertions of the conduct of the case brought against him are correct, as it concerns the delay and its inherent lack of merit. We may also accept, without more, that his career path may be somewhat more precarious as a result of his interdiction.
- [19] To my mind, the issues are, (a) Is the Claimant in those circumstances entitled to injunctive relief against the Defendant? Has the Claimant a legitimate expectation and an entitlement for the post? I think there is a serious question, as to whether he is entitled to injunctive relief. Is the claim filed pursuant to **Part 56 (1) (b) of the Civil Procedure Rules**, as it appears learned counsel, Mr. Beswick, is contending, in his written submissions? The Fixed Date Claim Form, seeks, an injunction restraining the 1st and 2nd Defendants, a declaration that the Claimant has a legitimate expectation, and a declaration that the Claimant has been deprived of his constitutional right, inter alia.
- [20] The application is opposed on the basis that, it is only in judicial review proceedings that injunctive relief is available against ministers and the crown.

The Defendants are saying this application does not constitute judicial review proceedings. None of the prerogative remedies are sought.

[21] However in his oral presentation, Mr. Beswick argues that, the claim for declaration for constitutional deprivation, is made pursuant to Part **56(1) (b) of the Civil Procedure Rules**. That deals with application by way of original motion under the constitution. However, in his written submission, it is the rights under the United Nations Universal Declaration of Human Rights 1948, that the application seeks to protect. The absence, of the right to work, in the Jamaican Constitution, may have caused counsel to seek the protection of international treaty. Questions of the reception of international treaties into domestic law may be relevant as also the availability of an adequate alternate remedy, the Constitutional remedy, being of last resort.

[22] There are statutory restrictions on the Court's ability to grant relief by way of injunction and specific performance in proceedings brought against the Crown. Section 16(1)(a) of the **Crown Proceedings Act** states;

"In any civil proceedings by or against the Crown the Court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:

*Provided that- (a) where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of **injunction or specific performance**, the Court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties;" [Emphasis provided].*

[23] Section 16(2) of the **Crown Proceedings Act** also states;

"The Court shall not in any civil proceedings grant any injunction or make any order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown."

[24] Lord Woolf, in **Re M v Home Office**, explained that in the general interpretation section of the Act, civil proceedings, would not include proceedings on the crown

side of the Queen's Bench, that is proceedings for the prerogative remedies. This meant that applications for injunctive relief would be available against the Crown in those applications for the prerogative writs.

[25] Lord Woolf at page 408 said;

*“Prior to the **Crown Proceedings Act 1947** it was long established that what would now be described as private law rights could be established against the Crown either by bringing a petition of right or, in the case of an action in tort, when a petition of right was not available (**Tobin v The Queen** (1864) 16 C.B.(N.S.) 310), by bringing an action for damages against the servant of the Crown responsible for the tort in his own name.”*

[26] And at page 413; as Professor Sir William Wade Q.C. has pointed out ("**Injunctive Relief against the Crown and Ministers**" (1991) 107 L.Q.R. 4, 4-5) there are likely to be few situations when there will be statutory duties which place a duty on the Crown in general instead of on a named minister. In broad terms therefore the effect of the Act can be summarised by saying that it is only in those situations where prior to the Act no injunctive relief could be obtained that section 21 prevents an injunction being granted. In other words it restricts the effect of the procedural reforms that it implemented so that they did not extend the power of the courts to grant injunctions. This is the least that can be expected from legislation intended to make it easier for proceedings to be brought against the Crown.

[27] In **Brady & Chen Ltd. v. Devon House Development Ltd.**, [2010] JMCA Civ. 33, S.C.C.A. No. 62/2009, delivered 30 July 2010., Smith JA, said“

“It was held that the court had jurisdiction to make coercive orders such as injunctions, in judicial review proceedings against Ministers of the Crown acting in their official capacity by virtue of the unqualified language of the Supreme Court Act 1981 of England. That Act made procedural changes to judicial review introduced in 1977 by RSC Order 53.”

[28] The Claimant in his written submissions, relied on several authorities which supported the grant of employment injunction. In **Hill v. C A. Parsons &Co. Ltd.** [1972] Ch 305, Lord Denning after stating that; “The rule is not inflexible, it permits exceptions, and, the court can in a proper case grant a declaration that the relationship still subsists and an injunction to stop the master treating it as at

an end,” noted that it may be said that the court is indirectly enforcing specifically a contract for personal services. So be it.”

- [29] On the issue of the Claimant’s legitimate expectation and entitlement to the post, reliance was placed on the matter of **Romeo Allen and Others v Commissioner of Police and Others** [2010] SC (Bda) 32 Civil (22 June 2010) and the definition of legitimate expectation in that case. The Defendants argued that the vital ingredients of the definition were missing in the Claimant’s case, for example, there was no express undertaking given, which could have induced an expectation of a specific benefit. On the contrary it was argued that, applications were open and not restricted to the Claimant.
- [30] Appendix 2 of the Policy which is entitled “*The Selection Appeals Procedure*” at number 1 states that “*persons have the right to appeal any selection decisions or actions and submit that appeal directly to the Public Service Commission*”. Number 5 of the said Policy states, “*that pending the decision on the appeal, no selection to that position can be made.*” Also employees are afforded the opportunity to have legal representation. As counsel for the Defendants rightly pointed out, the Applicant has an alternate remedy which is to appeal the selection decision.
- [31] If there is a serious issue to be tried, the next issue is whether damages is an adequate remedy? In assessing the adequacy of damages, Lord Diplock in the **American Cyanamid case** at page 408, said:

“If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff’s claim appeared to be at that stage. If on the other hand damages could not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff’s undertaking as to damages as for the loss he would have sustained from being prevented from doing so between the time of the application and the time of trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a position to pay them,

there would be no reason upon this ground to refuse an interlocutory injunction.”

- [32] If the injunction is not granted, and the Defendants are not restrained from offering the post to other applicants, the Claimants will not succeed to the job, he appears to have been preparing himself for. Is that the death knell for all his career aspirations? If acquitted, there should be no hindrance to continuing his aspirations both locally and internationally. There has been no question or challenge that the Defendants are unable to pay damages. It is a quantifiable sum; he is presently on half of his salary whilst on interdiction. His other losses are recoverable by claims for false imprisonment, malicious prosecution, and defamation.
- [33] In respect of the Defendants, damages may not be adequate. The Claimant complains that he is presently in a financial bind, it is fair to assume he would be hard-pressed to meet any damages that the Defendants might suffer. The Defendants are complaining that the delay to fill certain posts and continue their transitioning is likely to have serious consequences for their programme with the International Monetary Fund (IMF).
- [34] In granting an injunction the court has the power to exercise its discretion and to assess all the circumstances presented before it. After a careful assessment, I have formed the view that, the Defendants stand to suffer the greater irreparable harm. There is a serious public interest element here. When balanced with the rights of the Claimant, it is to my mind heavily outweighed. The critical business of the administration can have an adverse effect on many outside of the parties in this matter. The relative strength of the case, I find, as a separate finding, favours the Defendants.
- [36] In this case, refusing the injunction to restrain the 1st and the 2nd Defendants, their servants and/or agents and any person so connected to them, from taking any further steps whatsoever, to employ any person, to occupy the post of Director, Contraband Enforcement Team, Level 9 in the Jamaica Customs Agency, whether on a contract basis or otherwise, until the criminal proceedings against the Claimant have been concluded, will least likely result in irreparable prejudice. I cannot agree that in the balance of justice, the Jamaica Custom Agency should be deprived from at least contractually employing someone pending the outcome of the criminal proceedings. Again, if this injunction is wrongly refused, damages will provide be an adequate remedy to the Applicant.

[37] In light of the circumstances and the evidence submitted to this court, the court orders that;

1. The application for the interim injunction is refused;
2. The Applicant does not have a legitimate expectation and a right of entitlement to the post of Deputy Chief Executive Officer – Border Protection, Level 10;
3. No award as to damages for filling the post of Chief Executive Officer – Border Protection, Level 10 by the Jamaica Custom Agency;
4. The Applicant has not been deprived of his Constitutional Rights under Chapter 3, Section 13, Part 1(a) of the Charter of Fundamental Rights;
5. Costs to be costs in the claim.