[2015] JMSC Civil 39

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV 01903 OF 2014

BETWEEN	**HERBERT A. HAMILTON**	**CLAIMANT**
AND	**MINISTER OF NATIONAL SECURITY**	**1ST DEFENDANT**
AND	**ATTORNEY-GENERAL OF JAMAICA**	**2ND DEFENDANT**

Ms. Carlene Larmond instructed by the Director of State Proceedings for the defendants/applicants.

Ms. Dorothy Lightbourne, Q.C, instructed by Lightbourne & Hamilton for the claimant/respondent.

IN CHAMBERS

Heard: February 3 and March 10, 2015.

Application to Strike Out Claim – Whether Claim Should Have Been Begun as an Application for Judicial Review – Appointment to Board of Statutory Body – Termination before Expiry of Fixed Term - Claim for Remuneration.

Coram: F. Williams, J.

Background

[1] This matter comes before me both as the first hearing of the fixed-date claim form dated April 17, 2014; and as an application to strike out the claim on the basis that the claim has been begun by an inappropriate mechanism.

The Claim

[2] The claim is being brought by the claimant as a former appointee to the board of the Firearm Licensing Authority (the FLA), a statutory body, consequent on the termination of the said appointment before the term for which he was appointed had expired.

[3] By letter dated July 12, 2010 the then Minister of National Security, Senator the Hon. Dwight Nelson, had appointed the claimant to the Authority with effect from the said date, for a period of three years. The letter also indicated that he was to have been paid for his service at the rate of $910,500 per annum and a casual mileage rate of $35 per kilometer to attend board meetings.

[4] By letter dated May 1, 2012 the claimant's appointment to the said Authority was terminated in the following terms:

> "Dear Mr. Hamilton:
>
> I wish to express sincere appreciation for the service you rendered as a Member of the Firearm Licensing Authority.
>
> Please accept this Ministry's kindest regards and best wishes for the future.
>
> Peter Bunting, MP
> Minister".

[5] These are the terms of the relief (indicated in the fixed-date claim form), that the claimant seeks:

> "1. A declaration that the claimant is entitled to the sum of One Million, One Hundred and Thirty-eight Thousand One Hundred and Twenty-five Dollars ($1,138,125.00) representing loss of remuneration for Fifteen (15) months being the unexpired period of the Claimant's Contract

of employment as follows:

15 months @ monthly salary of $75,875.00 per month	=	$1,138,125.00

2. Interest thereon at the rate of twelve (12%) per annum.

3. An order that the First Defendant pay the Claimant the sum of One Million One Hundred and Thirty-eight Thousand One Hundred and Twenty-five Dollars ($1,138,125.00) with interest thereon, and costs of these proceedings."

The Defendants' Application to Strike Out

[6] The application to strike out the claim was made with a view to obtaining the following order:

"1. The Fixed Date Claim Form and Affidavit of Herbert Hamilton in Support of Fixed Date Claim are struck out for disclosing no reasonable grounds for bringing the claim."

[7] The grounds on which the application is based were stated in the written notice of application dated February 2, 2015 as follows:

"1. The facts supporting the claim are such that the main relief is for an administrative order, specifically, for judicial review for an order for certiorari to quash the Minister's decision to terminate the appointment of the Claimant to the Board of the Firearm Licensing Authority (FLA).

2. The appointment, and removal, of an individual to the Board of the FLA are administrative actions exercised by a Minister pursuant to the discretionary power vested in him under statute. Any challenge to the Minister's decision to remove the Claimant is one that ought properly to have been the subject of judicial review proceedings.

3. The claim for declaratory relief and damages, without an accompanying relief by way of judicial review to impugn the Minister's decision, is an abuse of process in that it seeks to circumvent the requirements of:

i. leave to commence a claim for judicial review; and
ii. the time limit attendant the application for such leave."

Summary of the Defendants' Arguments

[8] On behalf of the defendants, it was not disputed that the claimant was appointed to and removed from the board of the FLA on the dates he avers. Their challenge to the claim is predicated on the following bases:

a. any challenge to the Minister's decision to remove him is one that should have been brought by way of judicial review.

b. the claim for declaratory relief and damages, without an accompanying claim by judicial review to impugn the Minister's decision is an abuse of process that seeks to circumvent the requirements of:

    i. leave to apply for judicial review;
    ii. compliance with the time limit for a judicial review application.

c. There is no contract before the court.
d. Although the claimant's claim is based on an alleged breach of a statutory duty, the duty on which he relies has not been identified.
e. The entire case as framed is contrary to proper procedure and the reliefs sought cannot be obtained.

Summary of Arguments for the Claimant

[9] On behalf of the claimant it was submitted that the claim is in compliance with Rule 56.9 of the Civil Procedure Rules (CPR). This is so because, as the rule requires, this claim (being one for judicial review) was begun by way of fixed-date claim form; and supported by an affidavit.

[10] Additionally, it was submitted that the appointment to the board for a three-year period, pursuant to section 26a of the Act is a mandatory period and that the Minister has no discretionary power to determine the said fixed period of appointment, except with cause; and the claimant was not terminated for cause.

[11] Further, Ms. Lightbourne submitted that judicial review is a remedy of last resort in situations in which there are no other remedies available (citing the case of **R (on the application of Lim and another) v Secretary of State for the Home Department** (2007) EWCA Civ 773 per Lord Justice Sedley at page 773). This is the particular dictum on which she relied:

> "It is well established…that judicial review is a remedy of last resort, so that where a suitable statutory appeal is available, the court will exercise its discretion in all but exceptional cases by declining to entertain an application for judicial review."

[12] Consequently, it was submitted, judicial review is not an appropriate remedy in this case, as the claimant is seeking a private-law remedy and not a public-law remedy; and there are no other remedies available to him.

The Court's Power to Strike Out

[13] The court's power to strike out is well established and of some standing. Apart from the power to strike out flowing from its inherent jurisdiction, the court also has the power to strike out pursuant to the provisions of the Civil Procedure Rules (CPR), in particular rule 26.3, which reads thus:

> "26.3 (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) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;
>
> (b) that the statement of case or the 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 the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or
>
> (d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10."

[14] This application, it appears, is being made pursuant to paragraph(s) (b) and/or – perhaps - (c) of this rule.

[15] It has been recognized and acknowledged that the power to strike out is one that should be used sparingly; and only in the clearest cases : see, for example, the learning expressed in paragraph 432 of Volume 37 of **Halsbury's Laws of England** , 4th edition, where it was stated:

> "…the summary procedure… will only be applied in 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."

[16] So that is one consideration that must govern the court's approach to this matter.

Analysis and Discussion

[17] In looking at this matter, it is evident that the central issue is whether this claim is one that relates to the attempted enforcement of a claim to private rights; or, on the other hand, whether it is in essence a public-law matter seeking to challenge the Minister's actions in terminating the appointment of the claimant.

[18] In trying to arrive at the appropriate resolution of this issue, the court has reviewed a number of cases, the main one being one from our local Court of Appeal, which might shed some light on, or offer some guidance in the matter; and in which some other similar cases were reviewed.

[19] The local case is that of **Sykes v The Minister of National Security and Justice and others** (1993) 30 J.L.R 76, a decision of the Jamaican Court of Appeal. In that case, the appellant along with other legal officers employed to the Government of Jamaica, had taken industrial action in the form of what is commonly referred to as a "sick out". The relevant ministry of government took the decision that they ought not to be paid for the days on which they had taken the industrial action and that sums in respect of those days were to have been deducted from their salaries. This decision was challenged and the question arose whether the claim should have proceeded as one seeking remedies of certiorari and mandamus to quash the minister's decision and compel the payment of the sums deducted; or, on the other hand, whether the desired relief should have been sought by way of an ordinary action. Among other things, it was held (as indicated in the head note), that:

> "(i) it is settled law that remedies by way of prerogative orders are discretionary and provide an effective means of challenging public authorities, but such protection is inapplicable to a claim for salaries for services rendered pursuant to a contract of employment as such a claim is governed by the ordinary common law and the provisions of the Crown Proceedings Act;

> (ii) a claim for salary withheld by a public authority seeks to enforce a private right and the appropriate proceedings is by writ; to seek a remedy by way of prerogative order is inappropriate and an abuse of the process of the court;…"

[20] So, here we have the Court of Appeal, in circumstances not significantly different from those in the instant claim, opining that an ordinary claim is best in circumstances such as obtained in that case.

[21] The **Sykes** case also makes reference to a number of other judgments, which might also be used for guidance in this case. Among them is the case of **Roy v Kensington and Chelsea and Westminster Family Practitioner Committee** [1992] 2 WLR 240, in which Lord Bridge of Harwich (at page 241 of the judgment) expressed this view:

> "It is appropriate that an issue which depends exclusively on the existence of a purely public law right should be determined in judicial review proceedings and not otherwise."

[22] Also in the **Sykes** case, Downer, JA observed (at page 80 B of the judgment) that:

> "…where there is a claim for salary withheld by a public authority, then such a claim seeks to enforce a private right and the appropriate proceeding is by an ordinary action. By parity of reasoning therefore, to seek a remedy by way of the prerogative order would be inappropriate and to use stronger language, would be a misuse and abuse of process."

[23] In the light of the observation of Lord Bridge of Harwich in the **Roy** case, is it really possible for a firm and definitive conclusion to be drawn (based on the facts available to us), that the instant claim is one which: "…depends exclusively on the existence of a

purely public law right…"? It is my view that it is not possible to draw such a definitive conclusion.

[24] In coming to this view, it has not escaped my attention that in the **Sykes** case and in many or most of the cases referred to therein, the claimants were in fact civil servants employed to government; whereas here we are dealing with an appointee to a board (the Authority). I do not know whether that will make a difference in how the issues will be resolved at the end of the day. Nevertheless, I mention that I have borne in mind this dissimilarity between the instant case and those cited, in coming to the view that I might still draw some guidance from them. At the end of the day any such dissimilarity might either turn out to be a matter of significance; or, on the other hand, may very well amount to a distinction without a difference. However, it is not my task to definitively resolve issues such as these at this stage.

[25] Similarly, using the words of Downer, JA in the **Sykes** case, perhaps it could not precisely be said that this is: "…a claim for salary withheld by a public authority…" However, in my view, the two sets of circumstances are sufficiently analogous for me to conclude that in this case, as in the **Sykes** case, this claimant seeks to enforce a private right; and so it is not inappropriate for him to seek his remedy by way of an ordinary action.

[26] Another case that the court has considered is that of **Swann v Attorney-General of the Turks & Caicos Islands** [2009] UKPC, 22. In that case, the appellant, who, as claimant, had sought leave to apply for judicial review but had had his application refused, appealed unsuccessfully to the court of appeal and then to the Privy Council. He had sought to challenge a cabinet decision to reduce his allowance as chairman of the Public Service Commission. The allowance had been reduced from $90,000 per year to $30,000 per year. The Chief Justice of the Turks & Caicos Islands, who had heard the application for leave, had, in the exercise of his discretion, refused the application, mainly on the basis that the claim sounded in private, rather than public law. The Privy Council considered the nature and legal basis of the appellant's claim. The

substance of its decision that is relevant to this claim, in my view, might be found in paragraphs 13, 14 and 16 of the Board's advice, which were to the following effect:

> "13. Accordingly, the appellant's complaint amounts to a straightforward private law claim for around $15,000, being the difference over a period of about three months between (a) $90,000 a year, the rate of remuneration to which he claims to have been entitled, and (b) $30,000 a year, the rate at which he was actually paid. The basis of his entitlement is a conversation, or a series of conversations, described in paragraphs 10 to 13 of his affidavit, cited in paragraph 11 of this judgment. His claim is thus almost certainly in contract (although it is conceivable that it could be founded on an estoppel), and whether it is made out will turn on oral evidence.
>
> 14. In those circumstances, it seems clear that the appellant should not have sought to bring his claim by way of judicial review, and should have issued a writ. That is primarily because his claim is, on analysis, a classic private law claim based on breach of contract (or, conceivably, estoppel). Furthermore, proceeding by writ would in any event be the more convenient course, given that a properly particularised pleaded case would be appropriate...
>
> 16. ... the Board considers that the appellant's complaint that he has not been paid some $15,000 which he is owed cannot possibly justify investigating the public law issues which he seeks to raise in his judicial review application. There are occasions where it may be appropriate to permit public law issues to be raised in what is essentially a private law claim, but they are relatively exceptional. Those occasions would normally be where the public law issues are of particular importance to the applicant or where they should be aired in the public interest. However, there is no suggestion of either of those exceptional factors applying in this case."

[27] Again, as was the case with my approach to the **Sykes** judgment, I accept the **Swann** case as being sufficiently analogous to the instant case for me to be guided in my approach to the treatment of this application.

[28] With regard to the case of **R (on the application of Lim and another) v Secretary of State for the Home Department** that was cited (see paragraph 11 of this judgment), I regard it as being somewhat distinguishable (though I accept that the general principle stated there is applicable and sound), on this basis: in that case the emphasis seemed to have been on the fact that there was a statutory scheme affording an appeal, which does not appear to exist in the instant case.

[29] I also find myself to be in respectful disagreement with the defendants' contention that the claim is in compliance with Rule 56.9 of the CPR, as that very part (at rule 56. 4), requires as a condition precedent the prior application for and grant of leave to apply for judicial review before a claimant may properly issue a fixed-date claim form.

Conclusion

[30] In conclusion, with the benefit of the learning set out in the cases that I have reviewed, I am not in a position to say that the instant claim revolves around an issue involving what might be regarded as a purely public-law right. Having regard to the similarity between the instant case and the **Sykes** and (perhaps more so), the **Swann** cases, it seems to me that this matter really involves an attempt to assert a private-law right. In the circumstances I am unable to say that the claimant was in error in proceeding in the way he has or that this claim was brought in an effort to circumvent the need to apply for leave for judicial review; or as a means of trying to avoid confronting the time requirements for applying for leave for judicial review.

[31] After careful consideration, I am of the view that this is not one of those cases where the procedure adopted by the claimant might be said to be plainly and obviously wrong. In fact, I am of the view that the procedure adopted is the appropriate one. I am,

therefore unable to exercise my discretion by striking out the claim. In the result, therefore, the application to strike out must be refused.

[32] It is therefore hereby ordered as follows:

i. Application to strike out claimant’s claim refused.
ii. Costs of the application to the claimant to be agreed or taxed.