[2015]JMSC Civ. 37

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2014 HCV 04191

BETWEEN	**DANIEL DAWES**	**APPLICANT**
AND	**TRANSPORT AUTHORITY**	**1st RESPONDENT**
AND	**THE MINISTRY OF LABOUR AND SOCIAL SECURITY**	**2ND RESPONDENT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**3RD REPONDENT**

Chukwuemeka Cameron instructed by Carolyn Reid & Company for the Applicant with the Applicant being present

Ms. Monique Harrison for the Respondents with Ms Jordon legal officer for the Transport Authority present.

Heard: 17th of February 2015 and 6th of March 2015.

CIVIL PROCEDURE – APPLICATION FOR LEAVE TO PROVIDE FOR JUDICIAL REVIEW – ORDER FOR MANDAMUS-WHETHER MANDAMUS CAN BE ISSUED AGAINST A MINISTEROF LABOUR-WHETHER THE APPLICANT CAN BE REFERRED TO INDUSTRIAL DISPUTE TRIBUNAL-PART 56 OF THE CIVIL PROCEDURE RULES (CPR) 2002

IN CHAMBERS

SHELLY-WILLIAMS, J (AG)

THE APPLICATION

[1] The Applicant filed the Notice of Application for Leave to apply for Judicial Review was filed on the 2nd of September 2014. The Application requested certain Declarations and in particular :-

1. An order for Certiorari to quash the decision of the board to dismiss Mr Dawes.
2. A Declaration that the Applicant was unfairly dismissed by the Respondent.
3. A Declaration that in dismissing Mr. Dawes in the manner in which they did he was denied the right to security of employment and the right to a humane manner of dismissal.
4. An order that the Applicant is entitled to compensation and/or damages for the aforesaid unlawful dismissal.

In the Alternative :-

5. A Declaration that the Minister erred in not referring the matter to the Industrial Dispute Tribunal.
6. An order of Mandamus directing the matter to be referred to the Industrial Dispute Tribunal for arbitration.

In any event:

7. An order extending the time to apply for Judicial Review.
8. Any and all other Administrative Orders that this Honourable Court may deem it fit to grant.
9. The grounds on which such relief are sought are as follows;

a. Rule 56.3 of the Civil Procedure Rules provides for a person wishing to apply for Judicial Review first obtaining leave and the application may be made without notice.

b. Rule 56.4 of the Civil procedure Rules requires a judge of the Court to consider the application forthwith.

c. The Respondents failed to observe the principles of Natural Justice in particular the Applicant was not:

i. made aware that he was being investigated,

ii given an opportunity to participate in the purported hearing,

iii given an opportunity to obtain legal representation,

iv given a fair opportunity to contradict the purported case made out against him.

d. Despite it being specifically incorporated into the contract of Mr. Dawes, the 1st respondent failed to observe the rules and procedures set out in the Disciplinary Code which was agreed between management and worker representatives that ensures that fair and effective arrangements existed for dealing with disciplinary matters in accordance with paragraph 22(1) of the Labour Code.

e. The 1st Respondent failed to comply with paragraph 22 of the labour Code in that it failed to ensure that the matter giving rise to Mr. Dawes' dismissal was specified and communicated in writing to him.

f. In arriving at the decision to dismiss the Applicant the Respondent took into account irrelevant facts.

g. The Respondent, in light of the circumstances acted unreasonable in refusing to refer the matter to the industrial Tribunal.

h. The Respondents in finding that the Applicant applied to have the matter outside of the prescribed time made an improper finding of fact.

i. The Respondents in believing they were constrained to Section 11B of the Industrial Tribunal Act made an error in law when they refused to have the matter transferred to the Tribunal.

[2] The affidavit of Mr. Daniel Dawes in support of the Application was filed on the 2nd of September 2014. The affidavit had thirteen attachments to it. On the 13th of February 2015 both the Applicant and the Respondents filed skeleton submissions and the application was heard on the 17th of February 2015.

BACKGROUND

[3] Mr Dawes signed a contract with the Transport Authority which is dated the 16th of December 2011. The contract detailed the terms of agreement. The preamble to the

Terms of Agreement stated that "The Transport Authority shall appoint Daniel Dawes to serve in the capacity of Managing Director in the Transport Authority, pursuant to Section 7, subsection 3 of the Transport Authority Act, under the following terms."

[4] The agreement had a termination clause which gave two bases on which the contract could be terminated namely;-

1. *On either side giving three months notice in writing or the Transport Authority paying the Managing Director three months salary in lieu of notice.*
2. *Termination without notice and without pay in lieu of notice for cause.*

[5] On the 15th of November 2012 Mr Dawes was copied on a general staff advisory under the signature of the Chairman which was circulated by the Executive Assistant acknowledging receipt of a Petition from members of staff. The Petition advised that following an emergency meeting on the 14th of November 2012, a series of staff meetings had been arranged first of which would be on the 20th of November 2012.

[6] On receipt of the staff advisory Mr Dawes wrote to the Chairman of the Board on the 16th of November 2012 requesting, among other things, a copy of the Petition. On the 21st of November another Director provided a copy of the Petition to Mr Dawes after the Chairman failed to provide a copy.

[7] On the 19th of November 2012 Mr Dawes received a staff advisory which indicated there would be special committee to review allegations contained in the Petition.

[8] On the 21st of November 2012, the special committee meeting was convened. Mr Dawes was not invited to attend the entire meeting. At that meeting Mr Dawes was informed that he was being investigated with a view to dismissal. Mr Dawes indicated that he did not attend this meeting with a representative as he was not informed that it would be in his best interest to do so.

[9] On 27th of November 2012 Mr Dawes received a call from the Chairman who invited him to a special board meeting at Wyndham Hotel. He had not received any notification of the meeting prior to the phone call. At the arrival of the meeting he was informed that the Board had taken a decision to terminate his services immediately.

[10] Mr Dawes went back to his office and on arrival there he saw armed police officers. He was informed there were cameramen at his office, he heard on the airwaves that he had been terminated and he had to exit the building through the front gate in someone else's vehicle.

[11] On the 30th of November 2012 Mr Dawes received a letter informing him that he was dismissed and the grounds on which he was dismissed. On the 6th of December 2012 he received another letter referring to the letter of the 30th of November 2012 and indicating that he was dismissed in accordance with the terms of his contract and that he would be receiving three months pay in lieu of Notice. He received his three months pay in February 2013.

[12] On the 6th of December 2013 Mr Dawes sought the intervention of the Ministry of Labour and Social Security by lodging a complaint and requesting a conciliatory meeting.

[13] On the 6th January 2012 Mr Dawes received a reply written by Mr Kennedy who was writing on behalf of the Permanent Secretary. This letter indicated that a meeting was being convened on the 12th of February 2014. In that letter Mr Kennedy indicated that it was observed that the employment of Mr Dawes had been terminated from the 30th of November 2012 which was in excess of twelve months. The letter sought to bring to the attention of Mr Dawes Section 11 B of the Labour Relations and Industrial Disputes Act 1975 in relation to the legal time frame for referring matters to the Industrial Dispute Tribunal.

[14] On that date Mr Dawes attended the meeting with his attorney Mr Cameron. Ms Nerine Small attended the meeting on behalf of the Transport Authority. Ms Small attended the meeting in the capacity as a member of the Board of the Transport Authority. Ms Small refused to participate in the meeting as the request for intervention was barred by Section 11 B of the Labour Relations and Industrial Dispute Act (LRIDA).

[15] On the 15th of February 2014 Mr Dawes through his Attorney again wrote to the Minister challenging the position of the Transport Authority and requested a second conciliatory meeting. On the 12 May 2014 Mr Kennedy writing on behalf of the Permanent Secretary indicated that the Minister was precluded from referring the matter to the Industrial Dispute Tribunal.

[16] On the 10th of June 2014 the Attorney for Mr Dawes wrote to the said Minister requesting that he intervene on his own initiative in the matter. Mr. Kennedy responded indicating that the Minister had no authority based on current legislation to have the matter referred to the Tribunal. The letter concluded by suggesting that other avenues of redress be explored. It is this last letter of the Minister that is the subject of the application for Mandamus and the request for Judicial Review is in relation to the termination of Mr Dawes.

EVIDENCE

[17] The evidence for this application was in the form of the affidavit filed by the applicant. That affidavit was 47 paragraphs. The affiant was present but was not cross-examined. The affidavit chronicled the background of the employment of Mr. Dawes with the Transport Authority until he was dismissed. Mr Dawes attached documents to his affidavit including his contract of employment along with all the letters that were written on his behalf to the Ministry of Labour and Social Security and the responses that were received.

ANALYSIS

[18] Section 11B of the Labour Relations and Industrial Disputes Act states that:

> *"Notwithstanding the provisions of Section 9, 10, 11 and 11A where an Industrial dispute exists in any undertaking which relates to disciplinary action taken against a worker, the Minister shall not refer that dispute to the Tribunal to the Tribunal unless, within twelve months of the date on which the disciplinary action became effective, the worker lodged a complaint against such action with the Minister."*

The date of the decision in this matter would then be of vital importance as to whether or not this matter could have been referred by the Minister to the Industrial Distribute Tribunal. Counsel for Mr Dawes argued that the decision of the Board to dismiss Mr Dawes was made orally on the 28th of November 2012. This was followed up by the letter dated the 30th of November 2012.

[19] The letter of the 30th of November was followed up by a letter dated the 6th of December 2012. The letter of the 6th of December indicated that Mr Dawes was dismissed pursuant to the three month pay in lieu of notice and clearly laid out the amount of money that would be paid pursuant to these payments. The actual payment was made in February 2013. Counsel for the Applicant argues that the letter of the 6th of December was the real letter of dismissal or in the alternative it would have been the date that the money was paid to Mr. Dawes.

[20] Counsel for the Respondent argued that the decision to dismiss Mr Dawes was made on the 30th of November 2012. To support her point she highlighted that the heading of the letter of the 6th of December 2012 which actually referred to the letter of the 30th of November 2012 and merely details the payments that were to be made to Mr Dawes.

[21] On perusing the letters in question I find that the letter of the 30th of November 2012 is the letter of dismissal. It clearly stated that he had been dismissed and why this was so. The letter of the 6th of December 2012 was merely providing additional information on the dismissal and of sums to be paid to Mr Dawes.

[22] In the case of **City of Kingston Co-Operative Credit Union Ltd v Registrar of Co-Operative Societies and Friendly Societies and Yvette Reid,** Sykes J after reviewing a number of decisions at paragraph 18 of his decision states

> ..." that the date of the decision (and not the date the applicant acquires subjective or actual knowledge of the decision) is the date from which time begins to run against the applicant."

[23] Once the decision to dismiss Mr Dawes was made on the 30th of November 2012 then the twelve month period in which the Minister could refer the matter to the Industrial Dispute Tribunal would have expired from the 1st of December 2013. At the time when the letter was written to the Minister of Labour and Social Security on behalf of Mr Dawes on the 6th of January 2013 inviting him to refer the matter to Industrial Dispute Tribunal Mr Dawes would have been out of time.

[24] Section 11B of the Labour Relations and Industrial Dispute Act does not give the Minister a discretion to refer the matter to Industrial Relations Dispute Tribunal after the 12 month period as the Act says the Minister 'shall not' refer the matter after the one year period. In light of this finding that the relevant period for referral had expired the application for Mandamus against the Minister is denied.

DELAY

[25] Rule 56.6 of the CPR lays down what that the court is to take into consideration when dealing with applications for Judicial Review. Rule 56.6 (1) states

"an application for leave to apply for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose."

[26] Rule 56.6 (2) allows the court to extend time to apply for Judicial review. Rule 56.6(2) states that,

"however the court may extend the time if good reason for doing so is shown."

[27] In this case the decision that is being reviewed was made on the 30th of November 2012 and the application to extend time for application for Judicial Review was filed on the 2nd of September 2014 which is almost two years after the decision was made.

[28] In relation to delays the starting point it is laid out in the case of **O'Reilly v Mackman (1983) 2 AC 237** where Lord Diplock said:

"The public interest, in good administration, requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision of the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the persons affected by the decision."

This case also emphasises that even in instances where the delay is less than three months the court may still rule that there was undue delay.

[29] In this case the reason being given in relation to the delay is that the Applicant was seeking to embark on meetings with the Minister of Labour and Social Security along with the Transport Authority so that the matter could be referred to the Dispute Tribunal. The Applicant details the efforts made to achieve this end. I have reviewed the efforts that were made by the Applicant and find they do not reveal good reasons to extend time to apply for Judicial Review.

ALTERNATE REMEDIES

[30] There are a number of authorities that indicate that in an application for Judicial Review if there is an alternate remedy then leave for Judicial Review should not be granted. Rule 56 (3) (d) provides that the application must state:

> *"whether an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued."*

[31] The law in relation to whether a party has alternative remedies and as such that no leave should be granted to apply for judicial review was highlighted in the case of **Christopher Michael Coke v The Minister of Justice, Director of Public Prosecution, The Attorney General decided 9th of June 2010**. In that case McCalla CJ specifically dealt with Rule 56.3(d) and the cases decided in relation to that Rule. McCalla CJ highlighted a number of cases including the case of **R (Sivasubramanian) v Wandsworth County Court [2003] 1 WLR 475** which held that permission to claim Judicial Review would normally be refused where there was a suitable alternative remedy such as a statutory procedure. McCalla CJ argued at paragraph 48 of her decision that:

> *"There are no exceptional circumstances in this case that would entitle this court to grant leave to apply for Judicial Review. I do not agree that there are no alternative remedies available to the applicant as there are alternative remedies available under the Extradition Act."*

[32] The Applicant has sought to utilise the alternate remedies that are open to him in that he has filed a Claim Form on the 3rd of December 2013 namely **2013 HCV 06618 Daniel Dawes v Transport Authority**. In that claim the Applicant is suing the first Respondent for wrongful dismissal and the claim is for an award for over 40 million dollars. The application for Judicial Review did not reveal that such a claim had been filed and it only mentioned to the court after the Respondent highlighted it in their submissions.

[33] Counsel for the Applicant made it clear that he was not aware of this lawsuit but indicated that it does not affect the application as he understood that the Applicant is to

withdraw the lawsuit. It is very unfortunate that the Applicant did not seek to inform his counsel of these facts prior to the application for Judicial Review being filed. There was nothing that has been placed before the court to evidence the fact that a notice of discontinuance has been filed.

Having regard to rule 56.3(d) of the CPR and the authorities highlighted above I am constrained to refuse the application for leave to apply for Judicial Review.