



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. SU2020CV01635

**IN THE MATTER OF THE CONSTITUTION OF
JAMAICA, CHARTER OF FUNDAMENTAL
RIGHTS AND FREEDOMS 2011**

AND

**IN THE MATTER OF THE CONSTABULARY
FORCE ACT**

**BEFORE: THE HONOURABLE MR. JUSTICE DAVID BATTS
THE HONOURABLE MRS. JUSTICE CRESENCIA
BROWN BECKFORD
THE HONOURABLE MRS. JUSTICE TARA CARR**

BETWEEN

**ROHAN JAMES
and
NIGEL MURPHY
(on behalf of
THE MEMBERS OF
THE JAMAICA POLICE FEDERATION)**

1st CLAIMANT

DORIS STEWART

2nd CLAIMANT

AND

**MINISTRY OF FINANCE AND
PUBLIC SERVICE**

1st DEFENDANT

MINISTRY OF NATIONAL SECURITY

2nd DEFENDANT

COMMISSIONER OF POLICE

3rd DEFENDANT

ATTORNEY GENERAL OF JAMAICA

4th DEFENDANT

Constitutional Relief- Heads of Agreement – Whether binding contract – Whether legitimate expectation – Whether jurisdiction to grant declaratory relief if claim not contested – Whether breach waived – Whether mandatory order possible – Whether award of damages appropriate- Observations on the nature of declaratory relief.

Mrs. Jacqueline Samuels-Brown Q.C. and Keisha Spence for the Claimant.

Ms. Annaliesa Lindsay and Scott G. Mullings instructed by the Director of State Proceedings for the Defendants.

Heard: 4th April 2022, 5th April 2022 and, 3rd June 2022.

IN OPEN COURT.

[1] In this claim the Jamaica Police Federation and an individual member have had to sue the state and its agents because of “*frustration*,” to adopt counsel’s words, caused by the state’s failure to keep promises made. Also, unchallenged evidence reveals that, the existing manual system for recording overtime in the police force is unreliable due to “*integrity*” issues. These facts speak to, and may in part explain, existing deficits of trust within our society. It is something this Court has commented on in another context, see ***Robinson v Attorney General of Jamaica [2019] JMFC Full 4 (unreported judgment delivered 12th April 2019) at paragraph 373***. Social scientists may one day consider the implications, if any, for governance in the Jamaican state.

[2] On the first morning of this hearing Queen’s Counsel advised that there had been a change in the leadership of the Jamaica Police Federation. The named Claimants, the former officeholders, were therefore without objection replaced by the new officeholders. Also, by consent, a bundle of agreed documents was put in evidence as Exhibit No. 1. The court was informed that, the order for cross-examination notwithstanding, neither party required any witness to attend for cross-examination.

[3] The material facts were undisputed and may be summarised thus:

- a) The Jamaica Police Federation (the Federation) is a statutory body established by the Constabulary Force Act. The Federation's chief role is to represent its members in respect of matters concerning their general welfare as well as to enhance the efficiency of the force. The Federation is authorized to enter into negotiations, pertaining to salaries and emoluments, on behalf of its members.
- b) In the period September 2008 to December 2018 the Federation and the representatives of the state entered into five separate Heads of Agreement. Each agreement outlined, among other things, salaries and benefits due to rank and file members of the Jamaica Constabulary Force. The agreements are as follows:
- i. Heads of Agreement signed on the 11th of September 2008 for the contract period April 1, 2008 to March 31, 2010.
 - ii. Heads of Agreement signed on the 29th of April 2014 for the contract period 2012-2015.
 - iii. Heads of Agreement signed on the 10th of November 2015 for the contract period April 1, 2015 to March 31, 2017.
 - iv. Heads of Agreement signed on December 14, 2018 for the contract period of April 1, 2017 to March 31, 2019.
 - v. Heads of Agreement signed on December 14, 2018 for the contract period of April 1, 2019 to March 31, 2021.
- c) The agreements were entered into between, the Federation (and others) on the one hand and, the Government of Jamaica on the other. The agreements were intended to have legal effect and created a legitimate expectation, among the members of the Federation, that the obligations contained therein would be performed.
- d) The Federation and the Government agreed, in the agreement dated the 11th September 2008, to establish a forty-hour work week for rank and file members. Where members were required to work in excess of that forty-hour work week, they would be compensated with overtime pay. The challenge was to design and/or acquire a system capable

of accurately capturing the additional hours worked by those members who worked in excess of forty hours.

- e) It was agreed that a system was to be provided by the Defendants which would replace the existing method of calculating overtime hours with one that was reliable.
- f) The agreement of 2008 also provided that the system was to be implemented “*during the contract period*”, see clause 46 (b) page 24 of exhibit 1. The system ought therefore to have been established no later than the 31st March 2010.
- g) In the interim, and until the system was in place, all rank and file members would receive pay for an additional ten hours worked, whether or not they in fact worked overtime, see clause 46 (a) and (b) page 24 exhibit 1.
- h) The new system has not yet been established and the payment for the additional ten hours, whether or not the hours were worked, has continued to date.

[4] The Claimants contend that they are contractually entitled to have the system established and, alternatively, that they have a legitimate expectation that it should be done. The Claimants also seek compensation, retroactively computed from the 1st April 2008 to the present, for overtime actually worked in the period. They therefore seek declarations and orders, as well as, damages. The relief claimed is numbered (i) to (xxiii). On the first morning of the hearing, numbers (vi), (xii) and (xxiii) were abandoned and, numbers (iii), (xiii), (xiv), (xv), (xviii), (xix) and, (xx) were amended to delete the words “*at the rate of time and a half over and above their basic salaries.*” A new paragraph (xv)(a) was added which reads:

“xv(a) Declaration that since 2008 and continuing, the Ministry of National Security. and the Office of the Commissioner of Police have had an obligation in law to implement and utilise the necessary software/technology to accurately capture the working hours of the claimants and other members of the Jamaica Constabulary Force.”

[5] The Defendants’ counsel made no objection to these amendments. She also indicated that the Defendants did not oppose the relief at (i) and (ii) of the Amended

Fixed Date Claim. Counsel however urged that, as liability to the first two declarations was uncontested, the court ought not to grant any declarations. Reliance was placed on ***Gouriet v Union of Post Office Workers [1977] 3 All ER 70, The Hon. Dorothy Lightbourne v Andrew Coke, and others (unreported judgment 11th May 2010)*** and, ***St. George Jackson et al v The Attorney General (unreported judgment 4th August 2010)*** in support. We, with respect, do not agree that the cases cited preclude declaratory relief in this case. In the **Jackson** case the Honourable Mr Justice Roy Anderson, in a scholarly analysis, outlined the circumstances in which declarations may be made. He said, at paragraph 65 of a judgment which considered facts not unlike those we have before us:

“There is in my view, and I so hold, a dispute which exists between the parties which is susceptible to the court making a binding declaratory ruling. The dispute lies in the fact that there has been a breach, or at least non-performance of the terms of the Heads of Agreement for over one (1) year”.

[6] It is well known that declaratory orders are not usually made by consent. This is because a declaration, either of law or on the interpretation of an instrument, although unenforceable may have implications for others who are not parties to the proceedings. Therefore, before declaratory relief is granted, the court must apply its own mind to the issue even if the parties are agreed. The Court should only grant declaratory relief if satisfied that the construction, of the instrument under consideration, is legally correct and it is appropriate to do so. The declaratory remedy, being discretionary, is to be exercised judicially. Mr Justice David Richards correctly analysed the limits of the ***Gouriet*** case in ***Pavledes and another v Hadjisavva and another*** [2013] EWHC 124 (Ch). The learned authors Zamir and Woolf in their text, **The Declaratory Judgment, Second Edition**, at paragraph 4.001, had this to say about a declaration:

“It’s flexible and discretionary nature enables the court to exercise precise control over the circumstances and terms in which relief is granted”.

In *Financial Services Authority v Rourke All England Official Transcripts (1997-2008), [2001] Lexis Citation 2268, (unreported judgment dated 19th October 2001)* the claimant, a statutory body, sought declaratory relief. The questions before the court inter alia were whether there was jurisdiction and, if so, should the declarations be granted. Justice Neuberger decided that it was in the public interest, and in the interest of third parties, to grant the declarations. He said at page 4 of his judgment:

“Accordingly so far as the CPR are concerned, the power to make declarations appears to be unfettered. As between the parties in the section, it seems to me that the court can grant a declaration as to their rights, or as to the existence of facts, or as to a principle of law, where those rights, facts, or principles have been established to the court's satisfaction. The court should not, however, grant any declarations merely because the rights, facts or principles have been established and one party asks for a declaration. The court has to consider whether, in all the circumstances, it is appropriate to make such an order”.

And at page 5:

“It seems to me that, when considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant the declaration.”.

[7] An order of the Court, differs from declaratory relief in that it, is readily granted by consent. Parties are free, so long as they are of sound mind and are adults, to agree to be bound in any particular way by the coercive power of the Court. In this case, where the facts are not disputed and there exists a clear and unambiguous contractual obligation which has not been performed, there is no reason in law to prevent the declarations at (i) and (ii) being granted. There is also a very good reason to do so as it will make clear the precise legal obligation, of one public entity

to another, in a matter that if not clarified judicially may have adverse consequences for the public interest.

[8] The Defendants' counsel also argued that the Claimants were not entitled to a remedy because they, repeatedly agreed to extensions of time and, had accepted payment for ten additional hours (whether or not such hours were actually worked). As stated above, the contractual obligation was to put in place a system to accurately measure overtime worked by police officers and, the payments made were interim. In the last signed collective labour agreement, for 2019-2021, there was no expressed extension of time granted for the performance of the obligation, see exhibit 1 page 55. This is unlike in previous agreements, which had words indicating that the time to perform was extended, see for example clause 7 of the Heads of Agreement dated 10th November 2015 (exhibit 1 page 39) and clause 4(ii) of the Heads of Agreement dated 14th December 2018 (exhibit 1 page 46).

[9] The Defendants nevertheless submitted that, the previous extensions of time should lead to an inference that, time was again extended in the 2019 - 2021 contract. We disagree. It seems to this Court that the only inference possible is to the contrary. In not expressly extending time, the Claimants signalled that, they were no longer prepared to wait. Hence the dispute which lead to the commencement of this claim. The Defendants concede that they have a contractual obligation. They even called oral evidence from Devaughn Campbell, Director Corporate and Special Services of the Jamaica Constabulary Force, to support the fact that a budget allocation has been made for the system and that it will be in place by March 2023. His evidence was as follows:

“Q: Can you say when it will be up and running for purposes of Heads of Agreement

A: March 2023 full implementation”

[10] The Defendants have failed, year after year in the period 2008 to 2021, to perform its contractual obligation. The Claimants repeatedly gave written extensions of time. However, in the 2019-2021 contract this was not done. The Claimants

require that the obligation, which was to have been performed in the period 2009 to 2010, be effected now. Their reluctance to grant any further extension is perfectly understandable. The evidence therefore supports the entitlement of the Claimants to a declaration in terms of paragraphs (i) and (ii) of the Fixed Date Claim Form as amended.

[11] Counsel for the Crown also urged that the acceptance of the additional ten hours of overtime pay, in 2019 to 2021 and until today, amounts to acquiescence. This can hardly be so. The payment, for ten additional hours, was at all times agreed to be interim. These payments were to be made until the contractual obligation, to install a system to measure overtime, was performed. It was a part of the very first agreement, see clause 46 (a) and (b) (exhibit 1 page 17). The payment was never intended to be in lieu of implementation but rather was to be until implementation. There is therefore no inconsistency in the Claimants, demanding that the system be installed while, accepting the ten-hour payment in the 2019-2021 contract period and thereafter. Once installed the automatic payments, for ten hours, would end. The Claimants wish to have the actual hours worked measured and not payment for an assumed additional ten hours. Therefore, acceptance, of the payment in the 2019-2021 contract period, is not indicative of an agreement to extend time or of acquiescence in the breach.

[12] It follows that, not only are the Claimants entitled to the declarations at (i) and (ii) but, an order positing a time for performance is appropriate. This the Claimants seek in paragraphs (xix) and (xx) of the Amended Fixed Date Claim. If such an order is not made they would be forced to further litigate if the promise made this time is also broken. On the evidence, quoted above, there is a very good basis to stipulate the time by which the obligation is to be performed. There was no argument made challenging this Court's jurisdiction to make such an order. It is too late in the day for that. The orders are not against Her Majesty but her servants and/or agents. Similar orders have been held to be enforceable, see ***Gairy v. Attorney General of Grenada (Grenada) [2001] UKPC 30 (19 June 2001)***, and ***M v Home Office [1994] 1 AC 377***. In the result the Defendants will be ordered

to comply with their contractual obligations within the period promised by their witness.

[13] The only other question is whether or not the Claimants are entitled to damages. They seek an order for damages to be assessed. In this regard we agree with the arguments of counsel for the Defendants. The agreed ten-hour overtime payment, accepted until the system was put in place, represents agreed liquidated damages. The police officers agreed to accept payment for an additional ten hours, regardless of the actual hours worked, because of the existing difficulties in measuring the actual hours worked. There is therefore no prospect of loss being established in consequence of the breach. By agreeing to accept payment for ten additional hours the Claimants had in effect quantified their loss. We test this finding by asking whether, had the system been put in place as contemplated in the very first agreement, police officers might have claimed for overtime actually worked in the period prior to the system being put in place. The answer is clearly in the negative because the agreement contained no such stipulation and the Claimants agreed, in the interim, to accept an assumed ten-hour payment.

[14] We agree also with the submission, by counsel for the Defendants, that there is no scope for an award for "*constitutional damages*". In this judgment we have referenced the Heads of Agreement, and contractual obligations. It may suggest that the claim is one in contract. In fact, the application was listed before the Full Court because, the matter is framed as one seeking constitutional relief. The plea has been that even if no enforceable contract exists a legitimate expectation was created, by the Heads of Agreement, among the men and women of the Constabulary Force. The Defendants, to their great credit, conceded that the obligation existed and did not challenge this court's jurisdiction to hear the matter. They argued that, on the facts of this case, the Claimants were not entitled to a remedy. We hold that assessment of compensation, for the disappointed expectation, would in this case involve similar considerations as are applicable to an assessment of damages for the breach of contract. Therefore, the payment, for ten additional hours, similarly represents compensation for the disappointed

legitimate expectation. There is no evidence suggesting additional, or peculiar, loss or injury consequent on the disappointed expectation.

[15] The question then arises whether a nominal award is appropriate since, there has been a breach but, no damage proved. Courts have done this in other contexts. In the case at bar however the Claimant had in writing granted extensions of time for each contract period prior to the 2019-2021 contract. Therefore, either the breach had been waived or, there was no breach as the time for performance had been extended. Furthermore, as this court will be granting other remedies for the breach of the 2019 to 2021 contract, there is no need for a nominal award to be made.

[16] Having been successful, in their quest for administrative orders, the Claimants are entitled to costs, see ***Robinson v Attorney General of Jamaica [2019] JMFC Full 5 (unreported judgment 30th May 2019):***

“4. Having reviewed the authorities, we find that claims ought not to be discouraged. In this regard we are referring to matters brought in the public interest not necessarily matters in which the public have an interest. The two sometimes coincide but do not always. It is that reluctance, to discourage Claimants from applying for judicial review, which motivated Order 56.15 (5):

The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application.

5. The rule exists because, if an unsuccessful Claimant is required to pay costs, it may be a disincentive for someone who is considering litigation in the public interest. Manifestly, the absence of a similar provision in relation to a Defendant to the application for judicial review, indicates that for the unsuccessful Defendant the general rule of costs following the event will apply. It is in the public interest that a successful Claimant be awarded costs in judicial review proceedings.”

[17] In the result, and for the reasons stated above, we grant the following declarations and orders:

- (a) It is Declared that the Heads of Agreement entered into between the Jamaica Police Federation and the Ministries of National Security and Finance on behalf of the Government of Jamaica on the 11th day of September 2008 (for the contract period 1st April 2008 to 31st March 2010), on the 10th November 2015 (for the contract period 1st April 2015 to 31st March 2017) and, on 14th December 2018 (for the contract period 1st April 2017 to 31st March 2019) are binding on the Government of Jamaica.
- (b) It is Declared that the Heads of Agreement, referenced in paragraph (a) above, jointly and severally constitute binding contracts between the parties and created a legitimate expectation among the members of the Jamaica Constabulary Force.
- (c) It is Ordered that the Defendants on or before the 31st March 2023 put in place a system, which is in accordance with the terms agreed in the Heads of Agreement aforesaid and, which will capture the actual hours worked by members of the Jamaica Constabulary Force in excess of forty (40) hours per week and, that the said members be thereafter remunerated accordingly for such excess hours.
- (5) Costs to the Claimants against the Defendant to be taxed or agreed.

BY THE COURT:

DAVID BATTS J.

CRESENCIA BROWN BECKFORD J.

TARA CARR J.