[2018]JMSC Civ.113

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2015 HCV 03989

BETWEEN	**TANISHA PERRY**	**CLAIMANT**
AND	**THE COMMISSIONER OF POLICE**	**1ST DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2ND DEFENDANT**

IN CHAMBERS

Mr Chukwuemeka Cameron instructed by Carolyn C Reid & Company, Attorneys-at-law for the Claimant

Ms Carla Thomas instructed by the Director of State Proceedings for the Defendants

Heard: 15th March and 31st July 2018

Civil Procedure – Application to strike out claim – Principles to be applied

Administrative orders – Whether application for a declaration is subject to the same considerations as an application for judicial review – Whether the purpose to which the declaration will be put is a relevant consideration

LAING J.

The Application

[1] By Fixed Date Claim Form dated the 24thJune 2015, the Claimant seeks a declaration that she has a legitimate expectation to be re-enlisted as a member of the Jamaica Constabulary Force as well as any and all other administrative orders that this Court may deem fit to grant.

[2] By Notice of Application filed on 21st February 2017 the Defendants seek to have the Claimant's Fixed Date Claim Form struck out as being an abuse of the process of the Court (the "Application").

Background

[3] The Claimant was a Police Officer employed to the Jamaica Constabulary Force at the rank of Detective Constable and was attached to the St. Andrew Central Police Division in the parish of St. Andrew.

[4] This claim has its genesis in the decision of the then Commissioner of Police in 2011 to refuse to re-enlist the Claimant as a serving member of the Jamaica Constabulary Force.

[5] The grounds for the refusal are contained in the notice regarding non re-enlistment letter addressed to the Claimant and dated 25th January 2011 ("the Notice"). The Notice recites a series of events which resulted in the Claimant being charged on information No. 3009/2006 for uttering a forged document, namely a Jamaican Passport #A2231418 containing a US Immigration landing stamp purporting the same to have been signed by an Immigration Officer, knowing the same to have been forged and with the intent to defraud, contrary to section 9(1) of the Forgery Act.

[6] On 26th June 2007 a no order was made in the matter by Her Honour Miss J Pusey at the Corporate Area Resident Magistrates' Court at Half Way Tree. However, in the Notice it is asserted that the no order was made due to the absence of the main witness, a former employee of the United States Embassy, who had reportedly migrated. The conclusion expressed in the Notice was that the Claimant was not deemed trustworthy since she had medical certificates submitted on her behalf locally while she was actually in the United States of

America and had taken efforts to cover up this act of deception by the production of her passport containing the alleged forgery.

[7] Detailed evidence has been filed by the parties relating to the course of events leading up to the Notice. Nevertheless, having regard to the narrow scope of the Application, although those facts may have an impact on the merits of the Claim, I have not found it necessary to review in detail or analyse those facts in order to determine the issues that are currently before this Court.

The Defendants' submissions

[8] The grounds of the Defendants' Application are as follows:

1. Pursuant to rule 26.3(1) (b) of the CPR, the Court may strike out a statement of case as being an abuse of process of the Court.
2. The Claim concerns the decision not to re-enlist the Claimant, which is a decision made by the Commissioner of Police.
3. The claim concerns the decision of a public authority and turns exclusively on a purely public law issue.
4. The claim which is solely concerned with an issue of public law ought to have been commenced by way of an application for Judicial Review.
5. To commence claim which raises a purely public law issue by means of an ordinary claim is an abuse of the process of the Court.

[9] It is the Defendants' submission that this Court is empowered to strike out the Claim pursuant to Rule 26. 3(1)(b) of the Civil Procedure Rules ("CPR") . In support of this contention, Counsel placed reliance on the United Kingdom House of Lords decision in **O'Reilly v. Mackman** [1982] 3 All ER 1124 and in the decision of the Jamaican Court of Appeal in **Minister of National Security and Attorney General v. Herbert Hamilton** [2015] JMCA Civ 54. It was submitted

that these cases have confirmed, that in circumstances where a claim ought to have been commenced by way of judicial review proceedings, that case may be struck out as being an abuse of the process of the Court, if it is commenced otherwise.

[10] Counsel for the Defendants further submitted, that, included in the protection afforded to public authorities, is the requirement for expedition in making a claim. This is contained in rule 56.3 of the CPR, which makes provisions for an application for leave to apply for judicial review to be made promptly and in any event within three months of the decision in question. In addition, such applications for leave should be granted only where the Claimant has satisfied the Court that he/she has an arguable case with a realistic prospect of success.

[11] In support of the position that the Claim ought to be struck out, Counsel for the Defendants relied on the Court of Appeal decision in **Attorney General of Jamaica v. Keith Lewis**, (unreported), Supreme Court, Jamaica, SCCA No. 73/2005, judgment delivered 5th October 2007. In that case, Harrison J.A. in paragraph 22 of his judgment concluded that Mr. Lewis, a District Constable, ought to have availed himself of judicial review proceedings within 3 months of his effective dismissal and that his filing of an ordinary action some two years later for wrongful dismissal would amount to circumventing the correct process by recourse to the common law.

[12] Counsel for the Defendants submitted that the **Keith Lewis** case was applied approvingly by Morrison P (Ag) as he then was, in **Minister of National Security and Attorney General v. Herbert Hamilton** (supra). Counsel accepted that Part 56(1) of the CPR makes provision for '*applications for an administrative order*' which includes applications:

> *"(a) for judicial review*

> *(b) by way of originating motion or otherwise for relief under the constitution;*
>
> *(c) for a declaration or an interim declaration in which a party is the state, a court, a tribunal or any other public body:"*

However, Counsel submitted that this provision was not intended to "*erode the necessity of instituting judicial review proceedings in circumstances in which it should be regarded as the appropriate action to take.*" Counsel argued that if the provision in rule 56.1(1)(c) of the CPR is adopted in every case concerning actions or decisions taken by public authorities then it would render the provision relating to judicial review and the detailed provisions set out in the rules for the conduct of such proceedings otiose.

[13] In buttressing her arguments relating to the importance of securing the sanctity of the judicial review provisions, Counsel relied on the decision of the Belizean Court of Appeal in **Froylan Gilharry SR dba and Gilharry's Bus Line v. Transport Board & Ors** Appeal No. 32 of 2011 (delivered 20 July 2012) and in particular on the statement of Morrison JA at paragraph 70 of the judgment where his Lordship confirmed that several of the restrictive aspects of the judicial review procedure under Part 56 of the CPR are designed to safeguard the public interest.

[14] Counsel for the Defendants also relied on the local decision of Sykes J in **Inspector Marshalleck v. The Inspectors' Branch Board of the Police Federation & Ors** (unreported), Supreme Court, Jamaica, Claim No. HCV 1499 of 2004, judgment delivered 9 July 2004. This decision concerned an application to strike out a fixed date claim form which had been filed by an inspector of the Jamaica Constabulary Force seeking certain declarations relating to the number of police inspectors who had been elected to form the Inspectors Branch Board. At page 7 of the decision Sykes J commented as follows:

> *"To insist on correct procedure in respect of public bodies is not simply a question of a wrong or right approach to procedure. The rationale is found in public policy. The applicable public policy being that public bodies*

> *should be able to get on with the business of administration rather than worry about whether a claim form is going to land on their door steps. This is buttressed by the fact that the judicial review rules require the applicant to come to Court within three months of the date of the act or omission that provide the basis of the application. Again the time limit here is not one derived from any high legal principle but simply the result of the collective wisdom of the rules committee. They decided that three months is a reasonable time for the aggrieved person to act. The further removed in time from the three months expiration the application is made the greater the burden on the applicant to justify why he should be allowed to revisit an issue that has passed. Nothing is wrong with that.*
>
> *Administrators are not to be kept in limbo. If it were intended to obliterate the procedural distinction between public and private law matters the rules committee would have done so. The fact that they have maintained the distinction must mean something. It could not be that they intended the courts to ignore the distinction in the name of flexibility..."*

[15] Counsel submitted that because of the distinction between public law actions brought by ordinary claim and public law actions brought by judicial review proceedings, each individual claim must be examined to determine whether it is permissible for the action to be brought by ordinary claim rather than judicial review.

[16] Counsel argued that the Claimant in seeking a declaration that she has a legitimate expectation to be re-enlisted is challenging the decision of the Commissioner to refuse her application for re-enlistment. The Defendants referred to the re-enlistment provision as contained in provision 1.10(b) of the Book of Rules for the Guidance and General Direction of the Jamaica Constabulary Force, which provides that:

> *"(a) Sub-Officers and Constables desiring to be re-enlisted for a further term of five (5) years must make an application at least fourteen (14) weeks before the expiration of term and must be medically examined at least twelve (12) weeks before the current term expires".*

[17] It was submitted on behalf of the Defendants that a decision relating to re-enlistment is a discretionary one. Counsel relied on the case of **Corporal Glenroy Clarke v. Commissioner of Police and the Attorney General** (1996)

33 JLR 50, where Carey JA affirmed that there is no such thing as an automatic right to re-enlistment. It was also noted that the Claimant is not seeking to challenge the process by which the Commissioner arrived at his decision, for example by asserting that she was not afforded a fair hearing, but that she is challenging the substance of the decision. It was argued that in so doing, the Claimant is seeking to circumvent the judicial process in that she is seeking to achieve the result of re-enlistment which is a result she could not have obtained by way of judicial review having regard to the fact that over four years had passed when she filed the claim.

The Claimant's Submission

[18] The Claimant is contending that the declaration sought can be obtained without the judicial review procedure and that it can go forward to a full hearing unaccompanied by a prerogative order because a declaration is listed as a separate administrative order in part 56 of the CPR.

[19] It was submitted by the Claimant's Counsel that the Claimant is not seeking an ordinary declaration as provided for by rule 8.6 of the CPR but that it was made expressly clear in the Claim that the Claim was in accordance with Part 59.9 of the CPR seeking an administrative order. It was submitted that if the Court is satisfied that the Claimant is seeking an administrative order on the face of the statement of case, then the Court cannot find properly that the Claim is unsustainable.

[20] The Claimant sought to distinguish between the Claimant's case and the cases relied upon by the Defendants, namely the **Herbert Hamilton** case and the **Keith Lewis** case. It was submitted that the issue in those two cases was whether private law rights, as opposed to public law rights, were being pursued by private law and further, that if it were public law rights that were being pursued, whether the appropriate route would be by way of judicial review. It was noted that in the **Herbert Hamilton** case it was found that the applicant was pursuing a private

law right and as such did not have to go by way of judicial review. Counsel contended that the cases relied on by the Defendants do not assist the Court in determining the issue currently before it, because the Claimant is pursuing a public law right using a public law remedy.

[21] Counsel for the Claimant also sought to distinguish the case of **O'Reilly v Mackman** (supra) and submitted that while the legislative framework in England does not provide an alternative method to initiate an action in public law against a public authority other than by way of judicial review, our Jamaican law does.

[22] In support of the distinction between the Jamaican legislative framework and the English legislative framework Counsel found support for his point in the Judgment of Fraser J, in **Office of Utilities Regulations v. Contractor General** [2016] JMSC Civ 27. It was indicated that Fraser J opined that a public law declaration is a separate administrative order and that nowhere in the Jamaican rules is this type of declaration mentioned as needing to come under the aegis of judicial review.

[23] Counsel also referred to paragraphs 86 and 87 of the Judgment of Fraser, J where he stated as follows:

> *"[86] On the basis of that analysis there is therefore now no need for leave to be applied for in respect of "public law" declarations. I go further. I find attractive the position advanced by Ms. Larmond. Not only is there no need, there is no basis on which the court can properly consider the question of leave in relation to declarations. It is not, as advanced by counsel for the applicant, that there are now parallel approaches (with or without leave) which can be taken with regard to pursuing declarations as a relief".*
>
> *[87] The fact that judicial review is defined to include the prerogative remedies, suggesting that other remedies may fall under its aegis, does not mean that a declaration is contemplated as one such remedy, given that the relief of a declaration is specifically provided for as a separate administrative order in the same rule. There has, it seems been a complete break with the past in the scheme of the CPR, where declarations involving public bodies are concerned.*

[24] Counsel commended the conclusions of Fraser, J to this Court and submitted that having regard to the factual matrix of this case the Claimant is entitled to apply for an administrative order in the form of a declaration.

LAW AND ANALYSIS

Administrative Claims

[25] Part 56.1 of the CPR provides as follows :-

> *"56.1 (1) This Part deals with applications*
>
> *(a) for judicial review;*
>
> *(b) by way of originating motion or otherwise for relief under the Constitution;*
>
> *(c) for a declaration or an interim declaration in which a party is the State, a court, a tribunal or any other public body; and*
>
> *(d) where the court has power by virtue of any enactment to quash any order, scheme, certificate or plan, any amendment or approval of any plan, any decision of a minister or government department or any action on the part of a minister or government department.*
>
> *(2) In this part such applications are referred to generally as "applications for an administrative order".*

[26] My brother D. Fraser, J in the case of **Office of Utilities Regulation v. Contractor General** (supra) completed a thorough analysis of the issue as to whether a public law right ought to be properly brought by way of judicial review or by way of a claim for a declaration. He also did an analysis of the **O'Reilly** case and contrasted it with the Jamaican position under the CPR. At paragraph 85 of the Judgment the learned judge quoted from his earlier decision in the case of **Audrey Bernard Kilbourne v The Board of Management of Maldon Primary School** 2015 JMSC Civ 170, where at paragraph 17 he had stated as follows:

> *"[17] .....In Jamaica the applicable Part 56 of our Civil Procedure Rules treats declarations where one party is "the State, a Court, a tribunal or any other public body", as a separate administrative order. Essentially it is*

> *a public law declaration. Nowhere in the Jamaican rules is this type of declaration mentioned as needing to come under the aegis of judicial review. It is not even stated as in Part 54 of the United Kingdom Rules that where declarations are being sought in conjunction with the former prerogative orders the procedure must be by way of judicial review.*
>
> *[18] I have come to this conclusion though mindful of the Court of Appeal decision of* ***The Chairman, Penwood High School's Board of Management and the AG v Loana Carty****. In that case the appellants sought inter alia to have portions of the respondent's claim struck out. These portions were where she: 1) sought a declaration that she was dismissed in breach of the Education Regulations 1980 and 2) sought damages for unfair dismissal. The application was refused in the Supreme Court and on appeal the issue in relation to point 1 was whether the aspects concerning the Education Regulations properly fell under the auspices of public law and therefore, to institute them in a private law claim is an abuse of the process of the court.*
>
> *[19 In the Court of Appeal, Brooks JA cited with approval the general rule in* ***O'Reilly v Mackman*** *relied on by the defendant Board in the instant case. He also referred to the rule in* ***Roy v Kensington and Chelsea and Westminster Family Practitioner Committee*** *[1992] 1 All E R 705. This case provides an exception to the general rule stated in* ***O'Reilly v Mackman****. That exception provides that a litigant asserting his entitlement to a subsisting private law right, whether by way of claim or defence was not barred from seeking to establish that right by action, by the circumstance that the existence and extent of the private right asserted could incidentally involve the examination of a public law issue. The exception was however unable to assist the respondent as relief for unfair dismissal is available only from the Industrial Disputes Tribunal. Her claim was accordingly struck out".*

[27] I note in particular the conclusions at paragraphs 86 and 87 of the **Audrey Bernard Kilbourne**, (previously referred to at paragraph 23 herein). I accept that CPR 56.1(1)(c) permits an application for declarations where one party is "*the State, a court, a tribunal or any other public body*", as a separate administrative order which is essentially a public law declaration not requiring permission. However, with the utmost respect to my learned brother, I do not share his conclusion that there are not now parallel approaches (with or without leave) which can be taken with regard to pursuing declarations as a relief. It seems to me that, had the rules committee which provided the framework for the CPR, wished to institute a single channel regime in respect of declarations this could

easily have been made patently clear. This is especially so because a single channel regime would have the effect of completely removing the public body protections that are available as in the case of applications for other administrative actions. It is therefore my respectful view that having regard to the wide scope and ambit of public law declarations that may be sought, there is always the possibility that a litigant may seek a declaration, the terms and effect of which are more appropriate for judicial review proceedings. It appears to me that in such cases, that applicant ought to be subject to the strict judicial review regime which requires permission.

[28] Even if I am wrong in these conclusions, I am firmly of the view that a Claimant does not have an absolute right to bring a claim for a public right declaration, or to state it more precisely, a claimant does not have an absolute right to have such a claim heard. There will always be a great variety in the types of such declarations sought and in my view, the rules committee and legislators in framing CPR 56.1(1)(c) without making it clear that all claims for declarations did not require permission, must be taken to have recognised and accounted for:

> *"...the inherent 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" (see the observations of Lord Diplock in* ***Hunter v Chief Constable of West Midlands*** *[1981] 3 All ER 727 at 729).*

[29] In my view, in an appropriate case, a litigant might well be within its rights to apply for a claim for a declaration to be struck out and on such a challenge, the application for a declaration must be considered in the context of its particular facts, each application considered on a case by case basis.

The Herbert Hamilton case

[30] Counsel for the Defendants relied on the case of **Herbert Hamilton.** In that case the Claimant's fixed term contract for three years was terminated before its expiry. By fixed date claim form, he claimed (a) a declaration that he was entitled to the sum of $1,138,125.00 for the unexpired period of the contract; (b) interest

at the rate of 12% per annum; and (c) an order for payment by the Minster of the said sum of $1,138,125.00 plus interest and cost. The appellants' application to strike out the fixed date claim form was refused by F Williams, J and on appeal they continued to contend that the respondent's claim was to enforce a public law right and ought therefore to have proceeded by way of the Part 56 CPR procedure for judicial review.

[31] At paragraph 34 of the Judgment Morrison, P (Ag) (as he then was), found as follows:

> *[34] It follows from the above that I do not think that the decision in **O'Reilly** can avail the appellants in this case. On the face of it, the respondent's claim is for loss of remuneration arising out of an alleged breach of the contract constituted by the minister's letter of appointment dated 12th July 2010. There is plainly no other agenda, since as the respondent points out, he makes no claim to be reinstated as a member of the authority. He therefore asserts, as F Williams J found, a private law right. The fact that he also seeks, incidentally, to pray in aid the provisions of the Act in support of his claim to be entitled to be paid for the unexpired portion of his contract cannot prevent him, in my view, from proceeding by way of an action commenced by fixed date claim form in the ordinary way.*

[32] I accept the submissions of Counsel for the Claimant that the factual matrix underlying **Hamilton** are clearly distinguishable from the Claim herein in that in **Hamilton** the claim was to enforce a private law right. However, it appears to me that Morrison P's reference to the fact that there is plainly no other agenda since Mr Hamilton made no claim to be reinstated ought not to be wholly ignored. It is in this context noteworthy, that although the Claimant in the case before this Court has not made a claim to be re-instated, the Claimant has prayed for "*Any and all other Administrative Orders that this Honourable Court may deem it fit to grant*".

Is the purpose to which the declaration will be put relevant?

[33] Counsel for the Defendants submitted in oral arguments that the substance of the remedy which the Claimant is seeking is a discharge of the Commissioner's decision not to re-enlist the Claimant. It was further submitted that the declaration

as sought, by itself is worthless and its sole purpose is in pursuance of getting the Commissioner's decision set aside. Counsel argued that, effectively, though not explicitly, the Claimant is seeking to obtain a certiorari by the back door and in these circumstances the declaration is a remedy which ought to have been pursued by judicial review.

[34] Counsel for the Claimant, in response, submitted that there is no factual or legal basis that has been presented to the Court to support the suggestion that the Claimant is seeking to quash the decision of the Commissioner. Counsel focused mainly on the narrow terms of the declaration sought which is that the claimant has a legitimate expectation to be re-enlisted. He has submitted that this is clearly an administrative order to which the Claimant is entitled and that the Claimant is not in a position to "*trick*" the Court by using a declaration to obtain a certiorari.

[35] The Claimant has not sought an order for re-instatement but there is no evidence on her affidavit positively asserting that she is not seeking to achieve this. Counsel for the Claimant has submitted that this Court ought not to detain itself with the question as to the use to which the declaration can be put or whether it can be used to quash the Commissioner's decision. It was further submitted that the Court can safeguard the public body by an appropriate declaration for example limiting the declaration, but that it is too early to do that in the absence of proof of the use to which it is intended to put the declaration.

[36] It must be borne in mind that a declaration is a discretionary remedy. The Courts have developed principles which are to be considered in exercising that discretion. Among the considerations is whether the declaration will serve some practical or useful purpose. Where public bodies and Government authorities are concerned, one would expect that a declaration without more will usually have some persuasive effect without the need for any accompanying coercive orders. In some cases it may be all that a litigant needs. In this case, the Claimant is keeping her powder dry. She clearly has not sought an order for re-enlistment,

but also has not expressly dismissed this as an expectation which will be pursued, using the declaration in aid.

[37] I accept Counsel for the Claimant's submissions that there is insufficient factual evidence to support the Defendants' contention that the Claimant is seeking to quash the Commissioner's decision using the declaration as a tool. Clearly, certiorari would be the appropriate remedy if this is what the Claimant is trying to achieve. The Claimant has not so indicated, but I suspect that it may be, (and admittedly this is wholly speculative), that the Claimant is intending to use the persuasive force of the declaration, without more, to ultimately achieve re-enlistment and/or some other benefit. However, having regard to the fact that the Claimant has not expressly stated this as her objective, I agree with the arguments of her Counsel that this Court, certainly at this stage, ought not to conclude that it is.

Striking Out

[38] Part 26.3(1) of the Civil Procedure Rules provides that:

> *"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".*

[39] It is settled law 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."*

In **Business Ventures & Solutions Inc v Anthony Dennis Tharpe et al** [2012] JMCA Civ 49, Brooks, JA commented that:

> *"Under r 3.4(2)(c) [the English CPR equivalent of rule 26.3(1)(a)] a judge has an unqualified discretion to strike out a case such as this where there has been a failure to comply with a rule. The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage of the CPR over the previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out."*

Conclusion and disposition

[40] Having regard to the plethora of authorities which set out the limited ambit of the striking out remedy and in applying the overriding objective of dealing with matters fairly, I am not minded to strike out the Claimant's claim at this stage of the proceedings. This of course ought not to be taken to suggest that the Claimant has a strong claim for a declaration. The Court when hearing the substantive claim for the declaration as framed will consider all the relevant principles which ought to apply in exercising its discretion and I expect that the issue of whether the declaration will serve a useful purpose may occupy a more prominent position than it did in this application for striking out.

[41] For the reasons expressed herein the Court makes the following order:

1. The Defendants' application to strike out the Claimant's claim is refused.