

FEDERATION OF ST CHRISTOPHER AND NEVIS

NEVIS CIRCUIT

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO NEVHCV2010/0047

BETWEEN:

EMILINDO SMITHEN

Claimant

and

[1] THE ATTORNEY GENERAL OF ST CHRISTOPHER AND NEVIS

[2] THE LABOUR COMMISSIONER OF ST CHRISTOPHER AND NEVIS

Defendants

AND

CLAIM NO NEVHCV2010/0048

BETWEEN:

DAVE ALLEN

Claimant

and

**[1] THE ATTORNEY GENERAL OF ST CHRISTOPHER AND NEVIS
and**

[2] THE LABOUR COMMISSIONER OF ST CHRISTOPHER AND NEVIS

Defendants

AND

CLAIM NO NEVHCV2010/0049

BETWEEN:

FRANKLYN FRANCIS

Claimant

and

[1] THE ATTORNEY GENERAL OF ST CHRISTOPHER AND NEVIS

[2] THE LABOUR COMMISSIONER OF ST CHRISTOPHER AND NEVIS

Defendants

AND

CLAIM NO NEVHCV2010/0050

BETWEEN:

JESSICA GUMBS

Claimant

and

[1] THE ATTORNEY GENERAL OF ST CHRISTOPHER AND NEVIS

[2]THE LABOUR COMMISSIONER OF ST CHRISTOPHER AND NEVIS

Defendants

Appearances:

Mr Perry Joseph holding for Ms Maurisha Robinson for Claimants
Mr Leon Charles for Defendants

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2011: January 31; December 22
.....

- [1] **LANNS, M:** On 20th August 2010, the Claimants in these consolidated matters filed an Amended Claim Form seeking declaratory and other reliefs against the Defendants for the non payment of severance. The Claimants allege among other things that they submitted their severance payment claim forms within the time limited by law so to do, but the Labour Commissioner has failed or refused to pay the Claimants severance.
- [2] The Defendants filed an Amended Defence on 19th October 2010 in which they aver that the Claimants are not entitled to severance pay. In the alternative, the Defendants aver that the amended Claims should be struck out on the grounds that they are improper and premature in that the Claimants should have sought to quash the decision of the Labour Commissioner in judicial review proceedings; and (2) that the Amended Claims are barred by the provisions of the Public Authorities Protection Act, section 2 (a).
- [3] At a case management conference held on 6th December, 2010, these four matters were consolidated and the court ordered the parties to file submissions on the issues as to (a) whether the claims before the court are improper and premature and should have come by way of judicial review; and (2) whether or not the action is barred under section 2 of the Public Authorities Protection Act.
- [4] I think it will be prudent to consider the second issue first since that issue could, depending on the outcome, dispose of the claim completely and provide the Court with an opportunity to save time and costs.

Whether the Claim is statute barred under the section 2 of the Public authorities Protection Act

Defendants' submissions

- [5] The thrust of the Defendants' submissions as put forward by Mr Charles was that the Public Authorities Protection Act is applicable because the act, neglect or default complained of was the non payment of severance pay to the Claimants. Therefore, any cause of action for the recovery of severance pay would have arisen from the date the claims were disapproved. Each of the claims for severance pay was disapproved on October 12th 2004, and the present claims were not commenced until 25th March 2010 – five years and five months later. The court has no jurisdiction to enlarge the time stipulated under the Act. To do so would amount to a usurpation of the function of the Legislature. The action is therefore statute barred and should be struck out with costs to be taxed as between solicitor and client.
- [6] In support of his submissions, the Defendants' counsel quoted the dicta of Lord Buckmaster and Lord Atkinson in the case of the case of **Bradford Corporation v Myers** [1916] AC 242 and went on to submit that the Labour Commissioner has a statutory duty to determine claims for severance pay and he would be in breach of his public duty if he did not do so.
- [7] The Defendants' counsel then cited the cases of **Balteano Duffus v National Water Commission** (2007) UKPC Appeal No 13 of 2006 and **Genevieve Joyce v Antigua Public Utilities Authority**, Antigua and Barbuda High Court Civil Claim No. 112 of 1998.
- [8] In **Duffus**, a claim was brought against a public authority for wrongful dismissal. One of the issues before the Judicial Committee of the Privy Council was whether the action was statute barred pursuant to the Public Authorities Protection Act. Lord Scott of Foscote, delivering the decision of the Privy Council said:
- “The Court of appeal dealt very shortly with this point. The cause of action for wrongful dismissal, upon which Mr Duffus was suing, accrued on 28th May 1990. The action had not commenced until 9 March 1992. The interval was in excess of one year. So the action was barred by section 2 (1) of the Public Authorities Protection Act. Their Lordships agree....”
- [9] In **Joyce**, supra, a claim in negligence was brought against a public authority for causing a power line to come down in the public side walk, thereby causing the death of a child by electrocution. In its defence, the public authority pleaded the provisions of the Public Authorities Protection Act, Cap 352. Mitchel J in the course of delivering his judgment stated thus:
- “The meaning of the words of the statute in such an event is clear. Draconian and out of date with modern thinking as to the responsibility of public authorities to members of the public as the section is, the legislature has not seen it fit to remove it from our law as has been done in some other parts of the

Commonwealth. The result is that the filing of the writ seven months after the death in this case was fatal. The claim will accordingly be dismissed."

- [10] On those submissions and authorities, the Defendants maintain that the Claimants are precluded from pursuing the claim at this time.

Claimants' submissions

- [11] The gist of Ms Robinson's submissions is that the claims have been filed within the appropriate time period and that such claims are not subject to the Public Authorities Protection Act. The claims have been made pursuant to sections 26 and 34 of the Protection of Employment Act, argued counsel. Counsel further argued that pursuant to section 34 (1), the Claimants are authorised without any restrictions, to recover by civil proceedings in a court of competent jurisdiction, the severance payments to which they are entitled.

- [12] The Claimants argue that the Public Authorities Protection Act does not apply to the present case. They say that the cases to which the Public Authorities Protection Act applies, are limited. According to counsel, the Public Authorities Protection Act is usually applicable to matters relating to damages for tortious or civil wrongs by a public authority or enforcement of some form of penalty involving a public authority. In this regard, counsel cited the case of **Burma Oil Company (Burns Trading) Ltd v Lord Advocate** [1963] SC 410, and quoted Lord President Clyde as saying (in relation to the 1893 Public Authorities Protection Act of England):

"The Act has always been narrowly construed by the courts, since otherwise what was intended as a reasonable protection for a public authority would become an engine of oppression against those who litigate with it whether as pursuers or defenders. ...

The protection effected by such statutes as the 1893 Act was meant to protect persons from the consequences of committing acts which turned out to be illegal, although when they were carried out, they were intended to be done in the exercise of a public duty or under the authority of an Act of Parliament."

- [13] In further support of her submissions, counsel relied heavily on the case of **Kaufman Brothers v Liverpool Corporation** [1916] 1 KB 860. There, the court had to consider whether or not the United Kingdom Public Authorities Protection Act 1893, was applicable to a claim brought against a public authority to recover compensation under the Riot (Damages) Act. The defendants pleaded the Act but Lush J was of a different opinion. Counsel quoted Lush J as saying:

"This case to me seems to be really quite plain. The plaintiffs were the occupiers of premises in Liverpool which were damaged in a riot ... and they brought this action against the Liverpool Corporation to recover compensation under the Riot

(Damages) Act, 1896. That Act repealed the earlier Act of 1897, and enacted new provisions enabling persons in the position of the plaintiffs to claim, and take proceedings to recover compensation. Section 3 imposes a duty upon the police authority to fix the compensation. Section 4 provides that the plaintiff may sue the authority if they do not fix compensation, or if he is dissatisfied with the amount. In this case, the public authority failed to fix the compensation to the satisfaction of the plaintiffs, and they brought this action. It was an action to recover compensation under the statute; it was not brought to recover damages for any default on the part of the public authority; it was simply an action to recover such an amount as the county court judge might think right to allow as compensation for the damages done to the plaintiff's property. That being so, the defendant's pleaded the Public Authorities Protection Act, 1893, and contended that the plaintiffs were out of time because they had not commenced their action within six months ... The answer to that plea is that the action was not brought for any "act, neglect, or default" on the part of the defendants. In my opinion, the county court judge took the right view and rightly held that the Act did not defeat the claim. This appeal must be dismissed."

- [14] Ms Robinson concluded her submissions by reemphasizing that the Public Authorities Protection Act is not applicable in this case as the Claimants are only seeking to recover severance payments to which they are entitled in accordance with section 26 of the Protection of Employment Act. The claims are not brought for any damages - not in tort – not in contract, contended counsel.

The Law

- [15] The relevant legislation and procedural rules to be examined are

- (1) The Civil Procedure Rules 2000 rule 10.7 (1)
- (2) The Protection of Employment Act Cap 18.27
- (3) The Public Authorities Protection Act Chapter 5.13.

- [16] (1) Civil Procedure Rules

Rule 10.7 provides that the defendant may not rely on any factual allegation or factual argument which is not set out in the Defence. So in order for the Defendants to rely on the plea of limitation, it must be specifically pleaded. As can be seen from paragraph 11 of the Defence, the Defendants complied with this provision.

- [17] (2) Public Authorities Protection Act

The purpose of the Public Authorities Protection Act (the Act) is to protect public authorities. There is no dispute that the Attorney General and the Labour Commissioner (in the execution of their duties) are public authorities. They are public officers, who are employed by the State and are paid by the Federation of St Christopher and Nevis and as such they are entitled to the protection of the Act.

Section 2 of the Act restricts the right of a person who is aggrieved by the actions of a public authority to bring his or her suit within six months of the date of the alleged offending action:

- "2. Where any action, prosecution or other proceedings commenced against any person for any act done in pursuance of or execution or intended execution of any Act, or of any public duty or authority or of any alleged neglect or default in the execution of any such Act, duty or authority, the following provisions shall have effect:
- (a) the action, prosecution or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of, or in case of a continuance of injury or damage, within six months next after the ceasing thereof."

[18] Section 26 of the Act gives the Defendants the right to rely upon the Act:

- "26. Nothing in this Act shall prejudice the right of the Crown to rely upon the law relating to limitation of time for bringing proceedings against public authorities"

[19] (3) The Protection of Employment Act

Section 26 (1) provides:

"Where an employee has been continuously employed for a period of not less than one year and the employer terminates the services of that employee ... or the employee has terminated his services in pursuance of section 8(3), the employee shall be entitled to severance payment."

And section 26 (3) reads:

"An employee entitled to severance payment may claim payment in such a manner as may be prescribed."

And by section 31 (2)'

“ Where any person disputes the determination or decision of the Commissioner he may appeal that determination or decision to the Commissioners appointed under the Income Tax Act Cap 20.22.”

Section 34 (1) is in the following terms:

“ An employee may recover by civil proceedings in a court of competent jurisdiction the notice of payment and severance payment to which he or she is entitled under this Act.

Finding re: first issue

[20] In my judgment, the instant case falls squarely within the explanation and opinion of Lush J in **Kaufman Brothers v Liverpool Corporation, (supra)**. As such, I am clearly of the view that these claims are outside the ambit of the Public Authorities Protection Act and that the Claimants can therefore be sued within the ordinary limitation period applicable to such claims. As Lush J noted, the answer to the plea of limitation is that the action was not brought for any “act, neglect, or default” on the part of the defendants. In my opinion, the Act does not defeat the claims. The claims shall proceed.

[21] As to the cases cited by the Defendants, to my mind, those cases do not assist the Defendants, and can be easily distinguished on their peculiar facts. For example, unlike the situation in the instant case, the actions in **Bradford Corporation (supra)** and **Joyce (supra)**, were brought for “act, neglect, or default” on the part of the Defendants. In **Duffus’** case, Mr Duffus and the Commission Officials were carrying on correspondence regarding the abolition of the position which Mr Duffus previously held; his entitlement to pension and retirement benefits, and related issues. So, unlike here, the channels of communication were open between them. The Commission officials responded to each of Mr Duffus letters. Notably, in Duffus, the effective date of the accrual of the action was easily discernable, and the second limb of the Act was not applicable in that case.

Second issue

[22] The next issue which the Defendants raised was that the Claimants should have come by way of judicial review of the decision of the Labour Commissioner in failing or refusing to make the severance payment to the Claimants.

Defendants’ submissions

[23] Mr Charles submits that the Claimants claims do not fall into the classes of civil proceedings contemplated by the Crown Proceedings Act, but are in the nature of a review of the decision of the Labour Commission to disallow the claims for severance pay. Mr Charles contended that the Claimants’ claims amounts to a request for certiorari and mandamus, which can be given only in judicial review proceedings. For this submission, Mr Charles relies on the dicta of Sir Vincent Floissac in the case of **Re Blake, 1994, WIR, 177**.

“Although the originating summons purports to be an application for a declaration, the summons in fact transcends a claim for that remedy. The appellant in effect claims judicial redress at public laws by way of a prerogative order of mandamus ... to the extent to which the originating summons purports to be an application for an order of mandamus in public law, that order could not be made because the appellant did not obtain leave to make the application. The appellant could not circumvent Rules of the Supreme Court Order 44, rule 1(1), which provides that “No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been in accordance with this rule.”

- [24] Mr Charles further submits that the action brought by the Claimants is an attempt to ask the court to overrule the decision of the Labour Commissioner which this court has no jurisdiction to do, since an appeal from a decision of the Labour Commissioner must be made to the Commissioners appointed under the Income Tax Act Capo 20.22.
- [25] Additionally, Mr Charles submits that where administrative orders are sought, the procedure under rule 56.7 must be followed, so the Claimants should have brought their claim by way of fixed date claim along with the supporting affidavits containing specific information. The Claimants have failed to comply with this rule, submitted counsel.
- [26] Next, counsel submitted that a Claimant seeking an order under judicial review proceedings must first apply for judicial review and the Claimants have made no such application. Failure to make such an application is fatal, as was the case in **Elsroy Dorsett v Dwyer Astaphan et al** Claim No SKBHCV2007/0259, argues counsel.

Claimant's submissions

- [27] Ms Robinson, on behalf of the Claimant's submitted that the Claims before the court are appropriate. She relies on the provisions of sections 31 (2) and 34 (1) of the Protection of Employment Act. When these two provisions are taken together, submitted counsel, one gets an indication of what procedures to be followed by any person who is attempting to obtain severance payments pursuant to the Employment Act.
- [28] Counsel refutes the assertion that the Claimants' claims amount to an attempt to overrule the decision of the Labour Commissioner in accordance with section 31. Counsel for Claimants is of the view that in order for section 31 to apply, there must be in existence a determination of the severance claim, or, put another way, there must exist a decision as to the amount to be paid out to an employee, and where the employee is dissatisfied with the amount paid. No such decision exists, or any document which would support the Defendants assertion that the Labour commissioner had made a decision in relation to the Claimants claims for severance that were submitted to the Labour Department.
- [29] Counsel pointed to two cases from the OECS as authorities for the view that a Claimant should exhaust all alternative remedies before seeking leave of the court for judicial review:

- (i) **Jomo Thomas v Comptroller of Customs et al** - SVGHCV2008/331, in which Thom J stated "where there is an alternative remedy which is appropriate the Court may not grant leave, the alternative remedy should be pursued."
- (ii) **Commonwealth Trust v Financial Services Commission** – BVIHCV2008/0051; in which Olivetti J opined that if the court is satisfied that the alternative remedy exists and is suitable in the particular case, then it would deny an application for leave to appeal.

[30] Counsel is of the view that there is no merit in the Defendants submission that failure to institute judicial review proceedings is fatal, because where a matter has not been filed as an application for judicial review, rule 56.6 permits the court to grant leave as if an application had been made under Rule 56.3.

[31] Counsel does not agree that **Re Blake** cited by counsel for the Defendants is applicable to these proceedings as this case was pre CPR 2000.

Findings re: second issue

[32] The Claimants are seeking declarations that they are entitled to be paid certain specified sums of money as severance payments. They also seek orders that the sums so specified be paid to them in accordance with the Protection of Employment Act. I am in agreement with counsel for the Claimants that such remedies do not require an application for judicial review. I find that the remedy sought by the Claimant is appropriate.

[33] I take the view that the procedural requirement by way of appeal under section 31 (2) of the Protection of Employment Act does not arise, since there has been no response to the Claimants requests for severance payment, hence no determination or decision against which to appeal. In my judgment therefore, it was open to the Claimants to commence civil proceedings in the High Court in accordance with section 34 (1) of the Protection of Employment Act, rather than by way of the two stage process applicable to judicial review proceedings. I do not interpret The Protection of Employment Act, section 31 (2) as contemplating judicial review proceedings, given the facts of this case. The submission of the Defendants to that effect is devoid of merit.

Conclusion

[34] I would order that the matter be fixed for case management conference on 16th January 2012.

[35] It would be remiss of me if I did not acknowledge the very helpful and impressive submissions of counsel on both sides. I thank them for their assistance, and I commend them for their industry.


Pearletta E. Lanns
Master