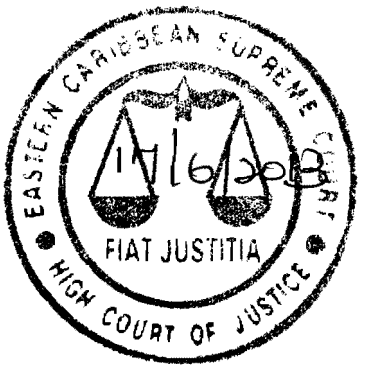
THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
SAINT VINCENT AND THE GRENADINES
HIGH COURT CIVIL CLAIM NO. 399 of 2010



BETWEEN:

OTTO SAM

Claimant

V

TYRONE BURKE
(The Chief Personnel Officer)

MICHELLE FORBES
(The Director, National Emergency Management Organization)

JUDITH JONES-MORGAN
(The Attorney General)

Defendants

Appearances:

Mr. Jomo Thomas for the Claimant
Mr. Grahame Bollers for the Defendants

2013: May 9
June 17

RULING

[1] **THOM J.** – On 30th January 2012 Mr. Otto Sam was granted leave to make a claim for judicial review of the decision contained in the Chief Personnel's letter of August 17, 2010.

[2] In his claim form filed on February 13, 2012, Mr. Otto Sam seeks the following orders:

(1) An order that the actions of Mr. Tyrone Burke, Chief Personnel Officer in transferring the Claimant from his post as a Head Teacher to no post at NEMO was arbitrary and irrational.

(2) An order that the action of Mr. Tyrone Burke, Chief Personnel Officer in

transferring the Claimant from his post as Head Teacher to perform menial task at NEMO and then sent on 90 days compulsory leave following the occurrence of Hurricane Tomas is illegal and irrational.

(3) Damages for the time in which the Claimant was removed from his position as Head Teacher.

(4) Costs.

[3] The matter was listed for trial on April 23, 2013.

[4] On April 18, 2013 the Defendants filed an application seeking the following orders:

(1) The 1st, 2nd and 3rd Defendants be struck out as parties to the claim.

(2) The reliefs claimed be struck out.

(3) Paragraphs 9-16, 19-22 and 25-28 be struck out from the statement of claim.

[5] The grounds on which the application is based are:

(1) Leave was granted for a review of the decision in the letter of August 17, 2010 on the grounds of irrationality and illegality and the 2nd and 3rd Defendants had no involvement in issuing the letter to the Claimant and the letter was signed by the First Defendant on the direction or on behalf of the Permanent Secretary Ministry of Education.

(2) The letter of 17th August 2010 was an assignment made by the Permanent Secretary in the Ministry of Education and not a transfer by the First Defendant.

(3) Leave granted by the Court did not cover the Claimant being transferred to perform menial task or the issue regarding 90 days compulsory leave following the occurrence of Hurricane Tomas.

(4) Paragraphs 9-16, 19-22 and 25-28 are an abuse of process they do not

relate to the matter for which leave was granted.

[6] Written submissions were made by the Claimant and the Defendants on the 8th and 9th of May respectively.

[7] Mr. Thomas also submitted that leave was granted inter partes therefore the proper procedure was for the Defendant to appeal the order granting leave and not to seek to strike out the claim. The Defendants are indirectly seeking to set aside the leave granted. Learned Counsel referred the Court to the cases of **Gary Nelson v Attorney-General, et al** ANVHCV 2008/0552, and **R v Secretary of State for the Home Department ex parte Chinoy** (1991) Admin.

[8] While I agree with the submission of Mr. Thomas, that is the general principle. Where for example the statement of case or a part of the statement of case is not in keeping with the leave granted, the statement of claim of the part of the statement of claim ought to be struck out.

[9] CPR 26.3(1) provides for the court to strike out a statement of case or part of a statement of case. It is generally accepted that striking out is a draconian step and one which the court will use sparingly. It is to be used only in plain and obvious cases. In **Robert Convich v Ann Van Der Elst** AXA HCV 2001/002 Rawlins J (as he then was) in considering an application to strike out stated:

> "It is only where a statement of case does not amount to a viable claim or defence or is beyond cure that the court may strike out."

[10] In **Citco Global Custody v Y2K Finance** BVICVA No. 22/2008 Edwards JA after referring to Blackstone's Civil Practice 2009 identified the governing principles when determining whether to strike out a statement of case as follows:

> "...the following circumstances are identified as providing reason for not striking out; where the argument involves a substantive point of law which does not admit of a plain and obvious answer; or the law is in a state of development; or where the strength of the case may not be clear because it has not been fully developed. It is also well settled that the jurisdiction to strike out is to be used sparingly since the exercise of the jurisdiction deprives a party of its right to a fair trial and the ability to strengthen its

case through the process of disclosure and other court procedures such as requests for information; and the examination and cross-examination often change the complexion of a case. Also before using CPR 26.3(1) to dispose of 'side issues', one should be taken to ensure, "that a party is not deprived of the right to trial on issues essential to its case. Finally in deciding whether to strike out, the judge should consider the effect of the order on any parallel proceedings and the power of the court in any application must be exercised in accordance with the overriding objective of dealing with cases justly."

PROPER PARTIES TO THE CLAIM

[11] Mr. Bollers submitted that the 1st Defendant is not a proper party to the claim because he deposed that he wrote the letter on behalf of the Permanent Secretary in the Ministry of Education.

[12] The 2nd Defendant is not a proper party since there is no allegation that she made the decision to assign the claimant to NEMO and the Claimant has not claimed any relief against the 2nd Defendant. Leave was not granted to pursue any allegations against the 2nd Defendant.

[13] The 3rd Defendant, the Attorney General was not a proper party since no allegations were made against the Attorney General, nor reliefs claimed against her. Learned Counsel referred the Court to the decision of the Privy Council in the case of **The Ministry of Foreign Affairs, Trade and Industry v Vehicles and Supplies Limited and Industrial Garage Limited** No. 2 of 1991.

[14] Mr. Thomas in reply submitted that the 1st Defendant is a proper party since pursuant to Section 2:17 (1) (c) of the Civil Service Orders for the Public Service of Saint Vincent and the Grenadines, transfers must be made by the Chief Personnel Officer. The Chief Personnel Officer issued the letter. Further secondment pursuant to Section 2:19 must be authorized by the relevant service commission, in this case the Public Service Commission. The Chief Personnel Officer is the Head of the Public Service. Alternatively, the Court should grant leave to the Claimant to file claim pursuant to part 56.4 to add the Public Service Commission and or the Permanent Secretary in the Ministry of Education.

[15] Mr. Thomas also referred the Court to Section 15(2) of the Crown Proceedings Act and submitted that all civil proceedings against the Crown must be instituted against the Attorney General. Therefore the Attorney General is a proper party.

FINDINGS

First Defendant

[16] I respectfully disagree with the submission of Mr. Bollers that the 1st Defendant is not a proper party. The letter of August 17, 2010 was issued by him. The mere fact that the 1st Defendant deposed that he wrote the letter at the instance of the Permanent Secretary in the Ministry of Education does not mean he is not a proper party. Further the 1st Defendant did not state in his affidavit that he was directed by the Permanent Secretary in the Ministry of Education to write the letter or that he wrote it on her behalf as submitted by Mr. Bollers. The 1st Defendant deposed at paragraph 8 of his affidavit as follows:

> "... My letter was written at the instance of the Permanent Secretary who advised and I verily believe the same to be true that the Permanent Secretary in the Ministry of National Security requested someone to be temporarily assigned to NEMO to assist with the preparation of a national disaster preparedness education policy."

[17] The phrase "at the instance of" simply means at the urging or suggestion of, it does not mean to act on the direction of a person. At no time in his affidavit did the 1st Defendant depose that the decision was not his but the decision of the Permanent Secretary in the Ministry of Education. He also did not do so in his letter of September 23, 2010.

[18] Further, pursuant to Part 8.5 a claim does not fail as a result of failing to add a person who should have been made a party. Part 8.5(1) (a) reads as follows:

> "(1) The general rule is that a claim will not fail because a person –
> (a) who should have been made a party was not made a party to the proceedings"

[19] I find that there is no legal basis on which the Court could find that the 1st Defendant is not a proper party.

Second Defendant

[20] I agree with the submission of Mr. Bollers that there is no cause of action disclosed on the pleadings in relation to the 2nd Defendant, and also no relief is sought against the 2nd Defendant. The 2nd Defendant is therefore not a proper party to the proceedings.

Third Defendant

[21] While I agree with Mr. Thomas that the Attorney General is the proper party in Civil proceedings against the Crown, this is a claim for judicial review of the decision of a public officer. I agree with the submission of Mr. Bollers that the Attorney General is not a proper party to these proceedings. No allegation has been made against the Attorney General and no relief is being sought against the Attorney General.

RELIEFS

[22] Mr. Bollers submitted that the Claimant does not seek declarations but rather he seeks orders, the reliefs should therefore be struck out. The leave granted by the Court does not cover performance of menial tasks, or the issue of Mr. Otto Sam's vacation leave.

[23] Mr. Thomas in response submitted that the reliefs sought are related to the Claimant's contention that the decision of the 1st Defendant is illegal and irrational.

FINDINGS

[24] I agree with the submission of Mr. Thomas. However, there is nothing in the pleadings to support the contention that the Chief Personnel Officer sent Mr. Otto Sam to perform menial task at NEMO. Also the decision for Mr. Otto Sam to proceed on leave is not the subject of review in this matter. Those references should therefore be struck out.

DAMAGES

[25] Mr. Bollers submitted that there is no basis for any claim for damages. Mr. Otto Sam has not pleaded nor led any evidence relating to damages. He has not shown he has suffered any loss whatsoever. Learned Counsel referred the Court to **Halsbury Laws of England** 4th Ed. Vol 1(1) paragraph 160 and submitted that the Court can only grant damages where:

"(i) the Claimant has joined with his application a claim for damages arising from any matter to which the application related; and

(ii) the Court is satisfied that if the claim had been made in an action begun by the applicant at the time of the making of this application, he would have been ordered damages."

[26] Mr. Bollers submitted that Mr. Otto Sam does not fall within either paragraph (i) or (ii).

[27] Mr. Thomas in response referred the Court to CPR 56.8(2) and submitted that a Claimant may include a claim for damages in his application for judicial review. The claim for damage is based on the conduct of the 1st Defendant, his action being arbitrary and unlawful. This conduct gave rise to the cause of action in the tort of Misfeasance in Public Office – See **Clerk & Lindsell on Torts** 20th Ed. paragraphs 14-102, 104 and 107.

FINDINGS

[28] Part 56.8(1) of CPR 2000 reads as follows:

"The general rule is that, where permitted by the substantive law, an applicant may include in an application for an administrative order a claim for any other relief or remedy that –

(a) arises out of; or

(b) is related or connected to; the subject matter of an application for an administrative order.

(2) In particular the Court may on a claim for judicial review or for relief under the Constitution award:

(a) damages;

(b) restitution; or

(c) an order for return of property to the claimant

If the –

(i) claimant has included in the claim form a claim for any such remedy arising out of any matter to which the claim for an administrative order relates; or

(ii) facts set out in the claimant's affidavit or

statement of case justify the granting of such remedy or relief; and

(iii) court is satisfied that, at the time when the application was made the Claimant could have issued a claim for such remedy.

[29] Part 56.8 permits a claimant to join claims for other reliefs in an application for an administrative order such as judicial review. It allows the Court to hear all claims in relation to a matter at the same time rather than having separate hearings. There must be a viable cause of action for which the relief could be claimed. It is a time and cost saving mechanism.

[30] It is not disputed that Mr. Otto Sam was removed from performing the functions of Head Teacher which are essentially managerial functions and sent to NEMO for an indefinite period to perform duties as directed by the Director of NEMO.

[31] The thrust of Mr. Otto Sam's pleaded case is that the decision to remove him from performing the functions of Head Teacher and sending him to NEMO is illegal and irrational and contrary to the terms and conditions of his employment. Having regard to these circumstances I find the remedy of damages could be included in the claim for judicial review.

Paragraphs 9-16, 19-22, 25-28

[32] Mr. Bollers submitted that these paragraphs are irrelevant. They do not disclose any reasonable ground to support the claim or judicial review nor are they relevant to the decision made by Mr. Tyrone Burke in the letter of 17th August 2010, nor do they comply with part 8 of CPR. Paragraphs 9-16 deals with Mr. Otto Sam's political past and a visit from the Prime Minister to the school at which Mr. Otto Sam was the Head Teacher.

[33] In relation to paragraphs 19-22, Mr. Bollers submitted that those paragraphs deal with a discussion the Claimant had with the Director of NEMO, while paragraphs 25-28 deal with Mr. Sam's vacation leave.

[34] Mr. Thomas in response referred the Court to Part 26.3(1) and the decision of the Court of Appeal in **Baldwin Spencer v The Attorney General of Antigua and Barbuda et al.** and submitted that the paragraphs contained material facts that support Mr. Otto Sam's case that the Defendants acted illegally and irrationally. They are not vexatious, frivolous or an abuse of process.

FINDINGS

[35] Paragraphs 9-16 deal specifically with Mr. Otto Sam's political association and his support for the Honourable Prime Minister and the party which he leads and the difference between Mr. Sam and the Prime Minister. There is nothing to show that Mr. Otto Sam's relationship with the Prime Minister is in any way related to the decision contained in the letter of August 17, 2010.

[36] Paragraphs 19-22 deals with the duties assigned to Mr. Otto Sam at NEMO. I find that they are relevant to the issue raised in the claim that the decision for him to perform duties at NEMO was irrational and illegal.

[37] In relation to paragraphs 25-28, I agree that paragraph 25 is irrelevant as it relates to the decision for Mr. Otto Sam to proceed on vacation leave which decision is not the subject of this claim for judicial review. Paragraph 26 is also irrelevant in that it relates to Mr. Otto Sam's political relationship with the Prime Minister and their subsequent differences.

[38] I find that paragraph 27 is irrelevant in so far as it refers to Mr. Otto Sam being sent on leave, and him being punished. As stated earlier the decision for Mr. Otto Sam to proceed on leave is not the subject of this claim for judicial review. At the leave stage I found that Mr. Otto Sam did not have an arguable case with a reasonable prospect of success that the decision was actuated by spite, malice and improper motive. For this reason, I also find that the first sentence in paragraph 28 is irrelevant, as it makes allegations of victimization.

[39] In conclusion, I find that the 2nd and 3rd Defendants are not proper parties to this claim. I also find that parts of paragraph 2 of the relief sought should be struck out and that

paragraphs 9-16, 25, 26, part of paragraph 27, and the first sentence of paragraph 28 should be struck out.

[40] It is ordered that:

(1) All references to the 2nd and 3rd Defendants as parties are hereby struck out.

(2) In paragraph 2 of the relief in line '2' the word 'menial' is struck out and in line 3, the words 'and then sent on 90 days compulsory leave following the occurrence of Hurricane Tomas."

(3) Paragraphs 9-16 of the statement of claim are hereby struck out.

(4) Paragraphs 25 and 26 of the statement of claim are struck out.

(5) In paragraph 27 of the statement of claim at line 4 the following words are struck out "and then sent on compulsory leave four (4) days after the country was struck by Hurricane Tomas, a storm that wiped out most of the agricultural production of the country and wreaked havoc with homes and lives of people in the Northern part of the island," and in line 9 "and transfer of the Claimant was intended to punish him for his views rather than for a contravention of the rules of his employment.

(6) The first sentence of paragraph 28 is struck out.

Gertel Thom

HIGH COURT JUDGE