

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV 2014/0490

BETWEEN:

D. GISELE ISAAC

Claimant

And

THE HON. ATTORNEY GENERAL

THE HON. MICHAEL BROWN

Defendant

Appearances:

Mr. Justin Simon Q.C. for the Claimant/Respondent

Mr. Gerald Watt Q.C. and Dr. David Dorsett for the Defendant/Applicant

2015: April 29

DECISION

[1] **HENRY, J.:** By Fixed Date Claim filed on 11th September 2014 and supported by affidavit, the claimant seeks various declarations, damages and cost against the defendants. Acknowledgment of service on behalf of the defendants was filed on 19th September 2014. By Notice of Application filed on 27th October 2014, the defendants seek an order that:

1. Leave be granted to the defendants to withdraw the Acknowledgment of Service filed on their behalf;

2. The Fixed Date Claim Form and supporting affidavit filed herein be deemed a nullity and be accordingly struck out; and
 3. Costs
- [2] The grounds of the application are that the fixed date claim filed on behalf of the claimant seeking judicial review of the actions of the respondents has been filed without leave of the court and is in contravention of CPR 56.3 and 56.4; that a check of the court's file discloses that there has been no application for leave filed by the claimant and consequently no application for leave has been heard nor has leave been granted; in light of these facts, the Acknowledgment of Service filed in the matter ought not to have been filed as the proceedings are a nullity. It is proper in the circumstances that leave be granted to withdraw the Acknowledgment of Service.
- [3] Counsel for the defendants submits that under Part 56 of the Civil Procedure Rules (CPR), a person wishing to apply for judicial review must first obtain leave. Part 56.3 (a) through (k) sets out matters that must be included in the application for leave. The application must be verified by evidence on affidavit. Counsel also refers the court to Pat 56.7 (4) (d), where it states that the affidavit in support of the claim must state the grounds on which such relief is sought; if leave has been given the claimant must serve a copy of the application for leave, the affidavit in support and the order giving leave - none of which has been complied with. He submits that because of the number of errors, the court lacks the jurisdiction to grant leave retrospectively.
- [4] Counsel for the claimant submits that the defendants' submissions are based on the assumption that the claim filed is a claim for judicial review. He submits that it is not. Counsel submits that an application for administrative order comes in 4 parts as enunciated in Part 56.1 (1). Judicial review is one such application. A declaration is another form of administrative order. According to him, declarations and judicial review applications are mutually exclusive.
- [5] He continues that the fixed date claim filed herein does not seek the remedies of certiorari, mandamus or prohibition – coercive remedies. It is because they are coercive remedies that they are made in an application for judicial review and an application for leave must be filed. Further, it is only where a claim for judicial review is made that application for leave is required. He points out that the headings for Part 56.3 and 56.4 do not refer to administrative orders, they speak to judicial review. He accepts that applications for leave are obligatory in claims for judicial review, his submission is that where one makes a claim for an administrative order, other than for judicial review, leave is not required.
- [6] In reply, Counsel for the applicants invites the court to, not only look at the specific relief sought, but to also examine the basis of the claim. He states that the first requested relief seeks a declaration that the decision of the Cabinet to suspend the claimant from her duties as Executive Secretary of the Board of Education was arbitrary, wrong in law, and without legal basis and is void and of no effect. This language, he insists, is a classic definition of illegality for which one can obtain judicial review. The 3rd declaration sought is also based on the ground of illegality and the

4th relief seeks a declaration that the claimant was entitled to an opportunity to be heard. According to Counsel, the three cardinal basis of judicial review are irrationality, illegality and procedural impropriety. He therefore asks the court to conclude that the claim is one for judicial review because it seeks declarations that the decision is illegal. Further, that in coming under administrative law, the claimant has to show that there is no other form of legal redress. He must comply with Part 56.7 (4) which has not been done.

- [7] Both parties readily admit that in order to make a claim for judicial review, leave of the court must first be obtained. The issue in this matter is whether the claim herein is, in fact, a claim for judicial review.
- [8] There are several remedies available today in the area of administrative law. They include injunctions, declarations, certiorari, prohibition and mandamus. The last three were previously referred to as prerogative writs, now orders. They are also referred to as coercive relief. Disobedience to orders of certiorari, prohibition and mandamus is punishable as a contempt of court. These are remedies which the court has discretion to give or refuse.
- [9] A declaration is a judgment that declares the law applicable to the parties but does not include any coercive order¹. Breach of a declaration is not a contempt of court. The court has the jurisdiction to make a declaration whether a claim to consequential relief is or could be claimed or not². A declaration claimed must relate to some legal right or to a legal interest of which the law will take cognizance.
- [10] As noted before, for the court to entertain a substantive application for one of the prerogative orders it must first grant leave. Lord Diplock recognized the need in **Inland Revenue Commissioners v National Federation of Self Employed and Small Business Ltd**³ when he stated:
- “The need for leave to start proceedings for remedies in public law is not new. It applied previously to application for prerogative orders, though not to civil actions for injunctions or declarations. Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.”
- [11] The jurisdiction of the court is not enlarged by the provisions of Part 56 which deals with Administrative law claims. The provisions deal only with procedure. An examination of the various sections is instructive.

¹ Hogg and Monahan, Liability of the Crown 3rd ed., Chap. 2 Remedies

² Halsbury Laws of England vol. 1 Administrative Law para. 185

³ [1981] 2 All ER 93

Part 56 of the CPR is headed Administrative law and governs claims for administrative orders. Rule 56.1 (1) sets out the scope of the part. It states:

“56.1 (1) This part deals with applications –

- (a) By way of originating motion or otherwise for relief under the Constitution of any member State or Territory;
- (b) For a declaration in which a party is the State, a court, a tribunal or any other public body;
- (c) For judicial review;
- (d) Where the court has power by virtue of any enactment or at common law 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 of government department.”

Subsection (3) defines judicial review. It provides:

“The term judicial review includes the remedies (whether by way of writ or order) of –

- (a) Certiorari, for quashing unlawful acts;
- (b) Mandamus, for requiring performance of a public duty, including a duty to make a decision or determination or to hear and determine any case; and
- (c) Prohibition, for prohibiting unlawful acts.”

[12] From the above sections it is clear that there are four types of applications which fall under the ambit of administrative orders. Two such types are applications for judicial review and applications for declarations. It is also clear that applications for judicial review are identified by the type of remedies sought in the application. They are claims for the prerogative orders of certiorari, mandamus or prohibition. Of course a claim for judicial review may also include a prayer for declaratory and other relief. So that an in-depth analysis of the nature of the claim is not necessary, an examination of the remedies sought will identify whether the claim is one for judicial review or not.

[13] The relief stated in the fixed date claim in the instant matter does not include any of the prerogative orders. It merely seeks declarations and damages. Therefore the court is of the view that, despite the language of the declarations sought, the claim seeks no coercive remedy and consequently is not one for judicial review. Leave to make such a claim is therefore not a requirement and the provisions of Parts 56.3 and 56.4 are not applicable.

Part 56.7

[14] Counsel for the defendants also submits that the affidavit in support of the fixed date claim is not in compliance with 56.7 (4). Part 56.7 is headed “How to make application for administrative order”. Subsection (1) makes it clear that its provisions apply to a fixed date claim for an administrative

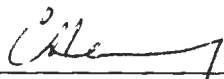
order, whether for a declaration, judicial review, relief under the Constitution or some other relief. Subsection (2) addresses an application under a relevant Constitution. However, subsection (3) applies to an application for administrative order and requires evidence on affidavit to accompany a claim form. Subsection (4) sets out what must be included in the affidavit. Subsections (3) and (4) are therefore applicable to the instant claim, being one for an administrative order.

[15] The fixed date claim form filed in the instant matter is accompanied by an affidavit. However it is not in compliance with subsection 4 in that it fails to state the nature of the relief sought; the grounds on which the relief is sought and the claimant's address for service.

[16] The above omissions however, do not make the proceedings a nullity, nor do the omissions require dismissal of the proceedings. The proceedings are at an early stage. The first hearing has not taken place. To dismiss the proceedings at this stage would be draconian. Since rule 56.11 provides that, at the first hearing the court may allow the claimant to amend any claim for an administrative order, the omissions can be rectified with an appropriate amendment.

[17] Accordingly, the application by the defendants is disposed of as follows:

- (a) The application for an order that the fixed date claim form and affidavit in support be deemed a nullity and accordingly struck out is denied.
- (b) The application for leave to withdraw the Acknowledgment of Service is also denied
- (c) The court notes that an amended affidavit by the claimant was filed on 10th February, 2015, therefore no further direction in this regard is necessary.
- (d) The defendants are to file and serve affidavit in answer within 21 days of this decision. Thereafter the matter is to be set down for first hearing by the court office.
- (e) Cost to the claimant in the sum of \$2,500.00


CLARE HENRY
High Court Judge
Antigua & Barbuda