EASTERN CARIBBEAN SUPREME COURT
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2017/0251

BETWEEN:

JAMES GARDINER

Respondent/Claimant

and

THE ATTORNEY GENERAL OF ST. KITTS AND NEVIS

Applicant/Defendant

And
CLAIM NO. SKBHCV2017/0252

BETWEEN:

ST. CLAIR TYSON

Respondent/Claimant

and

THE ATTORNEY GENERAL OF ST. KITTS AND NEVIS

Applicant/Defendant

And
CLAIM NO. SKBHCV2017/0256

BETWEEN:

SPENCER WATTS

Respondent/Claimant

and

THE ATTORNEY GENERAL OF ST. KITTS AND NEVIS

Applicant/Defendant

Appearances:

Mrs. Simone Bullen-Thompson for the Applicants/Defendants
Ms. Natasha Grey for the Respondents/Claimants

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2018: April 19: July

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DECISION

Introductory

[1] LANNS, J. [Ag]: Pending before the court are three separate, but similar applications which raise similar issues, filed on behalf of the Attorney General on the 31st October 2017 seeking the following orders:

In relation to Claim No. SKBHCV2017/0251: James Gardiner v. The Attorney General

(1) That paragraphs 16 and 17 of the affidavit of the claimant (Gardiner) be struck out

(2) That Gardiner's claim for constitutional redress for breach of sections 8, 10 and 15 of the Constitution be struck out: and

(3) Costs

In relation to Claim No. SKBHCV2017/00252: St. Clair Tyson v The Attorney General

(1) That paragraphs 17 and 18 of the affidavit of the claimant (Tyson) be struck out;

(2) That Gardiner's claim for constitutional redress for breach of sections 8,10 and 15 of the Constitution be struck out; and

(3) Costs.

In relation to Claim No. SKBHCV2017/0256: Spencer Watts v The Attorney General

(1) That paragraphs 16 and 17 of the affidavit of the claimant (Watts) be struck out;

(2) That Gardiner's claim for constitutional redress for breach of sections 8, 10 and 15 of the Constitution be struck out: and

(3) Costs.

[2] The grounds of the applications can be summarised thus:

(1) The matters contained in paragraphs 16 and 17 of the affidavits of Gardiner and Watts and paragraphs 17 and 18 of the affidavit of Tyson are scandalous and oppressive as they are not within the affiants own personal knowledge, and are not supported by the evidence put forward by those affiants;

(2) Paragraphs 16 and 17 of the affidavit of Gardiner and Watts, and paragraphs 17 and 18 of the affidavit of Tyson are not in accordance with the rules outlined in CPR 56 governing affidavits filed in support of applications for administrative orders;

(3) The proviso to section 18 of the Constitution of St. Kitts and Nevis provides that the court may decline to exercise its powers to grant relief if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law;

(4) The claimants have an alternative remedy pursuant to section 34 of the Protection of Employment Act, and or the Administrative Law claim as outlined in the fixed date claim form;

(5) The institution of the claim for breach of sections 8, 10, and 15 of the Constitution is an abuse of the process of the court and there is no reasonable ground for bringing the claim.

(6) The claim for breach of sections 8, 10 and 15 of the Constitution is not supported by the evidence.

[3] Shermel James, Labour Commissioner (Ag.) swore to and filed an affidavit in support of the applications. Her affidavit, in essence, is a repetition of the grounds of the applications of the applicants.

[4] The applicant/defendant has filed 'submissions' in respect of his application, and the respondents/claimants have filed 'skeleton arguments' in opposition to the application. Counsel for the parties augmented their written submissions with oral submissions.

[5] From here on, for convenience, I will be referring to the respondents interchangeable by their first names and as the 'respondents/claimants

Brief Background

[6] I glean from the filings, that Gardiner, Watts and Tyson are former employees of Cable and Wireless (C&W). They were all made redundant in or about July 2003, and received a redundancy package from C&W. They subsequently made a request of government for severance pay and were denied.

The reasons given for the denial were that the proviso to section 3 of the Protection of Employment Act (POE) applied to the respondents/claimants situation, as they had received from C&W a more favourable benefit than those provided for under the POE Act. The respondents/claimants assert that it was not correct to say they received a more favourable benefit from C&W. They complained that both Mr. James Rawlins, then Head of the Human Resource Department of C&W, and the Labour Commissioner, for similar reasons, refused to give them a Severance Pay Form to complete and submit to the Labour Department. They said that in or around 2009, they became aware that the government was making payments to certain persons in similar circumstances as theirs.

[7] On the 31st August 2017, (about nine years later), Gardiner, Watts and Tyson each filed a fixed date claim in the High Court accompanied by an affidavit, seeking declarations that the government of St. Kitts and Nevis breached their constitutional rights guaranteed by sections 8, 10 and 15 of the Constitution, by its failure to pay them severance benefits pursuant to the POE Act.

[8] In the alternative, Gardiner, Watts and Tyson seek a declaration that the government's interpretation of the proviso to section 3 of the POE Act (in its original form) was incorrect and based on a false premise.

[9] Additionally, Gardiner, Watts and Tyson seek an order that the government pay forthwith all severance benefits under the POE Act.

[10] On the 31st October 2017, the Attorney General applied to strike portions of the respondents/claimants affidavits, as well as the constitutional claim brought by them.

Considering the Application

(a) The Issues

[11] The issues for the determination of the court are:

(a) Whether portions of the affidavits of Gardiner, Watts and Tyson should be struck?

(b) Whether the constitutional claim brought by the respondents/claimants should be struck out as an abuse of the process of the court because there are/were alternative remedies which the respondents should have first exhausted?

[12] After a thorough consideration of the application and supporting affidavit, the oral arguments and written submissions of learned counsel, and after reviewing the governing legal principles, as set out

in the rules and the case law, I have concluded that part of paragraphs 16 and 17 of the affidavit of Gardiner and Watts should be struck, as well as part of paragraphs 17 and 18 of the affidavit of Tyson. I have also determined that the constitutional claim must be struck as an abuse of process because there are/were alternative remedies which the respondents/claimants should have first exhausted.

The **Court's Power to Strike Portions of Affidavits**

[13] The court's power to strike out parts of affidavits that contain scandalous, irrelevant or otherwise oppressive matter is conferred by CPR 30.3 (3) which provides:

> "The court may order that any scandalous, irrelevant or otherwise oppressive matter may be struck out of any affidavit."

[14] CPR 30.3 sets out what information affidavits may contain:

> "(1) The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge."
>
> "(2) An affidavit may contain statements of information and belief –
>
> (a) If any of these Rules so allow; and
> (b) If the affidavit is for use in an application for summary judgment or any procedural or any interlocutory application,
>
> provided that the affidavit indicates –
>
> (i) which of the statements in it are made from the deponents' own knowledge, and which are matters of information and belief; and
> (ii) the source of any matters of information and belief."

Paragraphs 16 of the Affidavits of Gardiner and Watts and Paragraph 17 of the Affidavit of Tyson

[15] Paragraph 16 of the affidavit of Gardiner and Watts and paragraph 17 of the affidavit of Tyson state as follows:

> "I learnt that the persons who were paid by the Government were known supporters of the then Government including the former Speaker of the National Assembly, Mr. Curtin Martin and the former Chief Executive Officer of the Sugar Industry Diversification Foundation, Mr. Terrence Crossman. Both of these persons are known supporters of the St. Kitts Nevis Labour Party, which said Party, formed the Government of the Federation for the period 1995 to 2015."

Paragraphs 17 of the Affidavits of Gardiner and Watts and Paragraph 18 of the Affidavit of Tyson

[16] Paragraph 17 of the affidavit of Gardiner and Watts and paragraph 18 of the affidavit of Tyson state as follows:

> "I am not a known or open supporter of the St. Kitts Nevis Labour Party, and I believe that this was the sole reason why I was not paid by the Government. It was clear that the then Government was applying the provisions of the law, that is, the Protection of Employment Act, in a discriminatory manner based on political affiliation."

Discussion

[17] The learned Solicitor General (SG) Mrs. Simone Bullen Thompson, on behalf of the Attorney General, asked the court to strike out the above stated paragraphs on the ground that matters therein are scandalous and oppressive as they are not within the respondents/claimants personal knowledge, and are not supported by the evidence put forward by them. The SG submits that the respondents/claimants are reporting what they heard, and this is not permissible. Further, submitted the SG, the respondents have not stated the source of their information. It was the further submission of the SG that the respondents/claimants in the offending paragraphs draw inferences as to why they were not paid.

[18] Learned counsel for the respondents/claimants, Ms. Natasha Grey (Ms. Grey) refutes the contentions of the SG. Counsel contended that it is a known fact throughout St. Kitts and Nevis that the former Speaker of the National Assembly is a member of the St. Kitts and Nevis Labour Party. Counsel submitted that the facts pleaded at paragraphs 16 and 17 of the affidavits of Gardiner and Watts and paragraphs 17 and 18 of the affidavit of Tyson are within the knowledge of the respondents/claimants. Counsel pointed out that it has not been denied that Martin and Crossman were paid severance benefits because of their open allegiance to the Labour Party. Relying on the case of Dominica Agricultural and Industrial Development Bank v Mavis Williams[1] counsel says failure to deny an allegation is deemed as admitted. In Reginald Anthony Hull v The Attorney General of St. Christopher and Nevis et al,[2] the Court of Appeal stated in no uncertain terms that a litigant who makes a genuine application to strike out a claim regardless of the rule under which

[1] Civil Appeal No. 20 of 2008
[2] SKBHCV2012/0029

he applies, ought not to be required ... to incur the expense of filing a defence to the very claim that he is asking the court to strike out.

[19] Counsel further submitted that the court has to consider whether the allegation contains material facts which support the respondents/claimants case which is grounded on discrimination based on political affiliation. Counsel argued that the alleged political affiliation is a material fact which can only be established at trial. In relation to the assertion that there is no evidence put forward by the respondents/claimants, Ms. Grey argued that at this stage, no evidence is required for, on an application to strike the facts are taken to be true.

Finding

[20] The court finds that the first sentence of paragraph 16 of the affidavit of Gardiner and Watts and the first sentence of paragraph 17 of the affidavit of Tyson should be struck as the matters contained therein are not based on information personally known to the respondents/claimants. It is hearsay because they are statements of information relayed to the respondents/claimants and are being offered to prove, without more, that Martin and Crossman were being paid severance benefits because of their open allegiance to the Labour Party.

[21] In relation to paragraph 17 of the affidavit of Gardiner and Watts and paragraph 18 of the affidavit of Tyson, I find that the following words in the first sentence should be struck: "I believe that this was the sole reason why I was not paid by the Government". Those words amount to a statement of opinion and belief as to why they were not paid rather than statements of fact. 'Witnesses should not give evidence as to inferences which they believe can be drawn from the facts[3]

[22] I also find that the second sentence in paragraph 17 of the affidavits of Gardiner and Watts and the second sentence in paragraph 18 of the affidavit of Tyson should be struck, namely: "It was clear that the then Government was applying the provisions of the law, that is, the Protection of Employment Act, in a discriminatory manner based on political affiliation". That sentence, to my mind represents a statement of opinion rather than statement of fact established. Additionally, I find that

[3] Per Hariprashad-Charles, J. in JIPFA Investments Limited v The Minister of Physical Planning, et al, Claim No. BVIHCV2011/0040

sentence to be scandalous in so far as it suggests misconduct or bad faith on the part of the government, imputing that the government acted in a discriminatory manner.

The Constitutional Claim

[23] The SG seeks to have the constitutional claim brought by the respondents/claimants struck out on grounds set out above at paragraph [2] sub-paragraphs 4, 5 and 6.

(a) Ground 1: Alternative or Adequate Means of Redress

[24] The SG contends that the respondents have adequate alternative means of redress available to them. The SG points to sections 18 (2) of the Constitution, dealing with the jurisdiction of the court in matters of enforcement, and which contains a proviso in respect of the approach to be taken by the court where the court is satisfied that adequate means of redress for contraventions are available under any other law. The SG then referred to and quoted selective paragraphs[4] in the case of Attorney General v Siewchand Ramanoop[5] in which the applicable principles are contained. The SG also relied on a passage from the case of Durity v Attorney General[6]. The SG then went on to submit that alternative means of redress for the alleged constitutional right may be brought pursuant to section 34 of the POE Act, or the Administrative Law Claim as outlined in the fixed date claim form filed by the respondents. The SG contended that the declaration sought in relation to government's interpretation of the POE Act will determine the issue of the respondents' entitlement to severance payment. The SG further submitted that the respondents have not shown any special feature which indicates that those means of redress would not be adequate. The SG therefore contended that the declaration sought in relation to government's interpretation of the POE Act will determine the issue of the respondents' entitlement to severance payment.

[25] On those submissions, the SG urged that the constitutional claim should be struck out as the respondents had already pleaded an administrative law claim and also have available to them a claim pursuant to the POE Act.

[26] Ms. Grey submitted on the other hand that the issues raised by the respondents/claimants in the proceedings are issues of a constitutional nature. Counsel pointed out that the allegation that the

[4] Paragraphs [23] [24] [25] and [26]
[5] [2005] UKPC 15
[6] [2009] 4 LRC 376, paragraph 28.

government acted in a discriminatory manner in its application of the law is nothing but a constitutional issue. Therefore, submitted Ms. Grey, the reliefs sought by the respondents/claimants are purely of a constitutional nature. For that submission, counsel placed reliance on the case of Seepersad v Attorney General[7] Counsel further submitted that the deprivation of property (namely money) in the manner in which it was done leaves the claimants with no other redress but under the constitution. It was counsel's further submission that the remedy of unfair treatment under the law is only available under the constitution and it would therefore be inappropriate to strike out the claim for constitutional redress[8]. To further bolster her argument that there is no alternative remedy available to the respondents/claimants. Ms. Grey next submitted that the POE Act is not available because the government expressly stated that there was no relief to be given under the POE Act; since the claimants received a separate package from Cable and Wireless, and now, the same government is positing that relief is available under the same POE Act. Ms. Grey concluded her submissions by urging the court to dismiss the application to strike out with costs, as it is totally misconceived.

Discussion

[27] CPR 26.3 (1) gives the court discretion to strike out a statement of case if it appears that (a) there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings; (b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending the claim;(c) the statement of case or 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; and (d) the statement of case or part to be struck out is prolix or does not comply with the requirements of Part 8.

[28] Quite apart from that rule, Section 18 (2) of the Constitution is applicable to the application. Section 18 (2) provides:

> "(2) The High Court shall have original jurisdiction
>
> (a) To hear and determine any application made by any person in pursuance of subsection (1); and

[7] 80 WIR 463, page 466, letters e - h
[8] Belfonte v Attorney General 68 WIR 413 letters e –g relied on

(b) To determine any question arising in the case of any person that is referred to it in pursuance of sub-section (3)

And may make such declarations and orders, issue writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of section 3 to 17 (inclusive): Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any law."

Are, or had there been Adequate Alternative Means of Redress Available to the Respondents/Claimants?

[29] Each of the claims herein was filed on the 31st August 2017. It is apparent, based on the affidavit evidence of the respondents/claimants, that each of the claims for Severance Pay Forms and or severance payments was refused in or around December 2009. At that time, there would have been available to the claimants, alternative adequate means of redress such as judicial review of the decision or non-decision of the Labour Commissioner disallowing severance payments to the respondents to which they claimed they were entitled, and which they assert was based on an incorrect interpretation of the proviso to section 3 of the POE Act. In the context of this case, judicial review proceedings would have likely resulted in a prerogative order of mandamus in public law. The respondents also had the option of making an administrative claim for the declaration which they are now seeking nine years later. As noted by the SG, the declaration sought in relation to the government's interpretation of the POE Act, will determine the issue of the respondents/claimants entitlement to severance pay. Notably, the Attorney General has not applied to strike out the claim for a declaration which the authorities say is a species of administrative order as provided in CPR 56.1 (1), and there appears to be no requirement for a claimant to seek leave of the court in this regard.

[30] The respondents also had available to them the option of instituting a claim under section 34 (1) of the POE Act which states: "An employee may recover by civil proceedings in a court of competent jurisdiction the notice payment and severance payment to which he or she is entitled under this Act". The respondents/claimants chose not to do so.

[31] The respondents/claimants by virtue of the POE Act, also had available to them the option of appealing the decision (if there is a decision) or non-decision of the Labour Commissioner. Section 31 (2)'of the POE Act provides:

> "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."

[32] Obviously, the respondents/claimants chose not to invoke that provision from the outset, though it was available.

[33] The respondents have not shown any special feature in their case which indicates the means of redress referenced herein were not, or would not be applicable. It cannot be that the respondents/claimants have only now become aggrieved by the decision or non-decision of the Labour Commissioner refusing to give them severance payments, or by the government's alleged 'incorrect interpretation' of the proviso in section 3 of the POE Act. The question which comes to the fore is, why now? Can the respondents/claimants simply choose when they should come to the court for a remedy? Have they been caught by the strictures of any limitation in any statute or otherwise?

[34] The reality is, it is doubtful whether the respondents can now apply for judicial review. They will need leave to do so, and they will be required to explain the inordinate delay, and to indicate whether there are alternative remedies available to them.

[35] Coming under the Constitution is nothing but a strategic move employed by the respondents, as there is no limitation applicable to a constitutional claim. However, the respondents are still required to satisfy the court that there are no alternative means of redress available to them. I am satisfied that in 2009 when the respondents were disallowed their severance payments, there were alternative means of redress available to them. There is no evidence before me that they explored the avenues that were available to them in 2009. Does it matter that they did not? Is it an abuse of process for them to now bring a constitutional claim premised on discrimination? Is it an abuse of process to come now to ask the court to declare that the government wrongfully interpreted the proviso in section 3 of the Constitution? Is it open to them to make a constitutional claim any time they please? In addressing this question, I take guidance from cases cited to me by the SG which I consider apt in respect of the issue of abuse of process, and other issues which arise in the applications before the court.

[36] In the case of Attorney General v Siewchand Ramanoop[9] the Privy Council discussed at length the issue of adequate means of redress, and the need for the courts to prevent abuse of constitutional proceedings. Though lengthy, the pronouncements of the Privy Council merit reproduction:

> "[23] The starting point is the established principle adumbrated in Kemajh Harikissoon v. The Attorney General, (1979) 31 WIR 348. Unlike the Constitutions of some other Caribbean countries, the Constitution of Trinidad and Tobago contains no provision precluding the exercise by the court of its power to grant constitutional redress if satisfied that adequate means of legal redress are otherwise available. The Constitution of the Bahamas is an example of this. Nor does the Constitution of Trinidad and Tobago include an express provision empowering the court to decline to grant constitutional relief if so satisfied. The Constitution of Grenada is an instance of this.. Despite this, discretion to decline to grant constitutional relief is built into the Constitution of Trinidad and Tobago. Section 14 (2) provides that the court 'may' make such orders, etc. as it may consider appropriate for the purpose of enforcing a constitutional right."
>
> "[24] "In Harrikissoon, the Board gave guidance on how this discretion should be exercised where a parallel remedy at common law or under statute is available to an applicant. Speaking in the context of judicial review as a parallel remedy, Lord Diplock warned against applications for constitutional relief being used as general substantive action. Permitting such use of applications for constitutional redress would diminish the value of the safeguard such applications are intended to have. Lord Diplock observed that an allegation of contravention of human right or fundamental freedom does not of itself entitle an applicant to invoke the s.14 procedure if it is apparent that the allegation is an abuse of process because it is made ... solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involve no contravention of any human right"
>
> "[25] In other words, where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature which, at least arguably that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature, would be a misuse, or abuse of the court's process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of State power."
>
> "[26] That said, their Lordships hasten to add that the need for the courts to be vigilant in preventing abuse of constitutional proceedings is not intended to deter citizens from seeking constitutional redress, where acting in good faith, they believe the circumstances of their case contain a feature which renders it appropriate for them to seek such redress rather than rely simply on alternative remedies available to them. Frivolous, vexatious or contrived invocations of the facility of constitutional redress are to be repelled. But 'bona fide' resort to rights under the constitution ought to be discouraged."

[9] [2005] UKPC 15. paragraphs 23 to 24

[37] In similar vein, the court in Durity v Attorney General[10] stated:

> "Whether this was a case for the appellant's immediate suspension is more open to question. But their Lordships agree with the Court of Appeal that it cannot be said that the appellant was deprived of the protection of the law when this step was taken against him. It was open to him to challenge the legality of the decision immediately by means of judicial review. Taken on its own, therefore, this complaint is not one that stands up to examination as an infringement of the appellant's constitutional rights. In any event, as a remedy by way of judicial review was available from the outset, a constitutional motion was never the right way of invoking judicial control of the commission's decision to suspend him. The choice of remedy is not simply a matter for the individual to decide upon as and when he pleases. (Emphasis added). As Lord Diplock observed, in Harrikissoon v AG of Trinidad and Tobago (1971) 31 WIR 348 at 349, the value of the safeguard that is provided by s. 14 [of the Constitution of Trinidad and Tobago] will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action."

[38] Being guided by the principles set out in the cases of Ramnaroop and Durity, and pronunciations of their Lordships in those two cases, I am satisfied, that the constitutional claim brought by the respondents must be struck, since judicial review and other choices were open to the respondents at the outset. They do not have the luxury of choosing a remedy as and when they please. Accordingly, the constitutional claim must be struck.

Conclusion

[39] I have come to the conclusion that part of paragraphs 16 and 17 of the affidavit of Gardiner and Watts should be struck, as well as part of paragraphs 17 and 18 of the affidavit of Tyson. I have also determined that the constitutional claim must be struck as an abuse of process because there are/were alternative remedies which the respondents should have first exhausted. The parties must bear their own costs..

It is ordered that:

1. The applicant's application to strike out portions of the affidavits of the respondents/claimants is granted in part.
2. The applicant's application to strike out the constitutional claim is granted and the administrative claim proceeds.

[10] [2009] 4 LRC, 376 at paragraph 28

3. The court office is directed to set the administrative claim down for first hearing on a date in the new law term/year to be fixed and notified.

4. Given the nature of the proceedings, and despite the fact that the constitutional claim should not have been brought, I think that this is a matter where the parties should bear their own costs.

[40] I am grateful to counsel for their assistance.

Pearletta E. Lanns
High Court Judge [Ag]

By the Court

Registrar