IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COLONY OF MONTSERRAT
(CIVIL)
A.D 2019

CLAIM NO: MNIHCV2016/0015

BETWEEN:

SIMON RILEY

Claimant

And

HONOURABLE ATTORNEY GENERAL

Defendant

Appearances:

Mr. Sylvester Carrott for the Claimant
Mrs. Sheree Jemmotte-Rodney for the Defendant

2019: June 26 and 27
2019: July 01

Judgment

[1] Evans, J. (Ag): By a claim form accompanied by a Statement of Claim, the Claimant launched an action against the Defendant sued in the capacity as a representative of the Crown.

[2] The Claimant claimed damages exceeding $329,278.67

[3] The matter appeared before Morley J. in 2018 and was subsequently ordered to be tried by another Judge because Morley J. had recused himself.

[4] The matter now appears before me and I heard evidence and submissions on June 26th and 27th. In addition I have received e-mail answers from the advocates as a result of a query that I raised by e-mail on June 29th.

[5] By the time that the matters appeared before me an Amended Statement of Claim and an Amended Defence had been filed.

[6] In addition updated written submissions had been lodged to accompany the original submissions.

[7] At all material times the Claimant has been an employee of the Government of Montserrat. The history of his employment, changes in job titles, wage structure/upgrading and what has been called "promotion" are set out in the pleadings

[8] As can be seen from paragraph 4 of the Amended Statement of Claim, the Claimant was as a reward for the extra work that he had to do as the result of the relocation of government to Olveston House given on top of his basic salary a further allowance/payment equal to half of his basic salary. That was intended to compensate him for the overtime that he had to do.

[9] That extra half payment persisted for over 11 years and the Claimant made no claims for overtime during that time. He was happy with that arrangement.

[10] That "half" allowance was withdrawn in February 2007 and the Claimant was given a "new" contract that made the Claimant financially less off - see paragraph 6 of Amended Statement of Claim. The Defendant calls what happened an upgrading but accepts in paragraph 6 of the Amended Defence that "the remuneration package of the upgraded post was less than what the Claimant had received prior to January 2007. Such a reduction was unlawful and steps were taken to remedy the situation.

[11] If in fact the calculation of the upgraded salary had been correctly carried out then the Claimant would not be worse off and importantly in my judgement would not be entitled to claim overtime because he would be still being paid what I call a salary and a half as compensation for having to work overtime.
To pay him overtime and a salary based upon the old one and a half's salary would in my view give him an element of double compensation

[12] The calculation that was carried out to remedy the situation was wrong and resulted in a shortfall of $660 pcm and is continuing. Whilst the Defendant does not admit the shortfall no evidence was adduced before me to dispute it. In fact the Attorney General deals with this matter in her helpful

written further submission at paragraph 6 where she explains and mathematically corrects Morley J's error in increasing the shortfall.

[13] In October 2007 the Claimant was "promoted" to a managerial post. That was as a result of a meeting that occurred on 15/10/07. A meeting that I find was interpreted in 2 distinctly different ways.
The Defendants thought that the promotion and salary increase prevented the Claimant from claiming overtime as it was in reality a re-instatement of the old salary and a half basis plus a bit- $29 pcm.
The Claimant thought that he was in effect going to retain his old package (that in essence contained compensation for overtime) without the need to work any overtime, which he believed, was going to be done by new recruits over whom he had managerial control.

[14] I find In essence that the parties were not ad idem as to what was agreed at that meeting.
The Defendants had no intention of paying the Claimant overtime and the Claimant did not expect to have to work overtime after the appointment of an underling.

[15] He was not and never has been provided with any security officers despite the fact that the appointment document (see p.24 Claimant's bundle) stated under the heading of Main Responsibilities/duties that his new job involved:

*"Coordinate, schedule and supervise the activities of maintenance staff, ground workers and security officers on compound and other government sites.
*"Continually monitor the facility to ensure that it remains safe, secure and well maintained"

[16] I accept that the Claimant was expecting at least one other security officer to be appointed soon who would have relieved him of the necessity to do overtime. On that basis, the new deal was a good one for him as he would be paid slightly more than his old salary and a half calculation and not be obliged to work any overtime

[17] I find that the failure to appoint any help for the Claimant over the last 11 plus years to be the best evidence to support my suspicion that the upgrading to a managerial post was as Mr. Carrott says nothing but a device.

[18] Turning now to the claim itself. In essence, despite the amount of paragraphs that have appeared in the pleadings and in the submitted lengthy submissions the Claimant's claim can simply be stated to be :

(a) A claim for underpayment at the rate of $660 pcm from 22/2/07 and continuing. This occurred because Mrs. Cassell unlawfully reduced the Claimant's basic salary and the calculation of his half salary resulting in an underpayment of $660

AND

(b) A claim for overtime worked - the quantum of which I am invited to assess.

[19] The Claimant was called to support his claims. I found him to be an excitable, uncontrollable, highly intelligent man who knew his case backwards and better than all in court.

[20] On occasions I had difficulty in accepting his evidence particularly in relation to an all-important meeting that involved Daphne Cassel and himself on 15th of October 2007. He told me that he did not think that he had agreed to what was on offer. I contrast that with paragraph 17 of his witness statement where he says "As a result of the discussion I then received a new offer of employment which I accepted"

[21] Overall I found him helpful but in his evidence and correspondence prone to exaggeration particularly in relation to the hours of overtime that he claimed to have worked.

[22] The Defendant called Philip Chambers who effectively produced the files. In addition, the Defendant called Debra Lewis, Cheverlyn Williams-Kirnon and Daphne Cassell.

[23] I found, Daphne Cassell, who was the main Defence witness to be an unhelpful witness. She was obstructive, would not answer simple questions and thought that by talking in Human Relations terminology she was effectively avoiding answering searching questions posed by Mr. Carrott or the court.

[24] On June 27 when she returned for cross examination, I took what for me was an unprecedented step of inviting the Attorney General to take her outside the courtroom to tell her to answer the questions that were being posed (notwithstanding the fact that she was still on oath and in the midst of being cross examined). The Attorney General obliged but there was no marked improvement in Daphne Cassell's willingness to answer questions when she returned.

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[25] Her performance was such that I am unable to prefer her evidence to that of the Claimant and where there is a conflict, unless her evidence is supported or corroborated by agreed documentation, I reject it.

[26] The topics that the Attorney General dealt with in her final oral submissions were:
(i) Limitation.
(ii) No entitlement to be paid for overtime and
(iii) Contention that the Claimant had suffered no loss.

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[27] I shall deal with the Limitation point first.

[28] Paragraph 28 of the Amended Defence states that the Claimant is not entitled to recover damages outside of the limitation period prescribed under section 4 of the Limitation Act.

[29] Section 4(1) of the Limitation Act imposes a 6 year limit from the date when the cause of action arose in actions founded on simple contract as this is.

[30] The action was commenced on 27/4/16.
-6 years back from that date takes us to 27/4/10.

[31] It is well established law that negotiations do not stop the limitation clock from running.

[32] I therefore find that all claims for sums that accrued before 27/4/10 are statute barred, subject to the question of whether there has been an acknowledgment under section 22 of the Limitation Act.

[33] Section 22(4) states that where any right of action has accrued to recover a debt or liquidated pecuniary claim.....and the person liable or accountable acknowledges the claim.....the right shall be deemed to have accrued on and not before the date of the acknowledgment.

[34] Section 23(1) states that the acknowledgment ....shall be in writing and signed by the person making the acknowledgment.

[35] The Claimant states that the document to be found at p.70 of his bundle is such an acknowledgement

[36] That document is dated 19/12/13 and is a document signed by the Cabinet Secretary headed **"**MEMORANDUM NO.291/2013-BY HE THE GOVERNOR-_COMPENSATION TO BE PAID TO SIMO**N RILEY FOR ADDITIONAL HOURS WORKED BETWEEN 2007 TO 2009"**

[37] In my judgement that document constitutes an acknowledgment complying with sections 22 and 23.

[38] The Attorney General contends that the acknowledgment itself is dated outside the limitation period that expired on 27/4/10 and is therefore of no help to the Claimant.
I disagree with her contention for 3 reasons:
(i) Section 22 contains no such limitation
(ii) Section 22 restarts the clock from the date of the acknowledgment.
(iii) Section 24(5) clearly allows an acknowledgment made after the expiry of a period of limitation but states that it does not bind a successor.

[39] So I find that the overtime claim (if it was valid) was not statute barred.

[40] However in my judgement the same reasoning does not hold good for the underpayment aspect of his claim. There is no reviving acknowledgment in relation to that aspect of the Claimant's claim.

[41] I have been referred to the case of HUGGINS NEAL NICHOLAS and AG and THE TEACHING SERVICE COMMISSION HCVAP 2008/18 a decision of the Court of Appeal.

[42] I am not persuaded that it helps the Claimant to revive or maintain a claim for underpayment losses incurred before 27/4/10 and hold that his claim in respect of those losses is limited to losses accruing from that date.

[43] Accordingly I award the Claimant $660 pcm from 27/4/10 to today's date.
I calculate that to be 110 months and award the Claimant $72,600.00 in respect of those losses.

[44] I turn now to consider the Claimant's claim for continuing overtime payments. I have as I have already said rejected this claim because to accede to it would result in a form of double payment.

[45] If however I am wrong I wish to assess what I would have awarded in respect of the overtime claim and consider the import of the memorandum referred to below.

[46] Page 70 of the Claimant's bundle exhibits the memorandum that I have already mentioned in paragraph 36 of this judgement. It is a decision of the Cabinet and the Governor to pay the Claimant $36,135.00 as compensation for additional hours worked by the Claimant between 2007-2009.

[47] I find that that offer was a genuine attempt to belatedly resolve a claim for additional hours and I find that it is an offer that is still open and has not been rejected by the Claimant.

[48] The basis upon which it was made is set out at paragraph 23 c of the Amended Defence where it is stated categorically that the sum offered did not represent overtime-a statement that I infer was made upon instructions from the Government.

[49] If I accept that contention then my reasoning as to why the Claimant would not be entitled to claim for overtime would not apply

[50] I accept that contention and I interpret this offer and the failure to update it to be a recognition and acknowledgment on the part of the government of a debt owed to the Claimant in respect of additional not overtime hours

[51] Accordingly in addition to the sum awarded for the underpayment I award the Claimant the sum of $36,135.00 making a total award of $108,735.00 plus the Special Damages claimed of $5,000.00 in respect of Mr. Brandt's fees making a total of $113,735.00

[52] In the event that I am wrong in refusing the Claimant anything in respect of overtime I turn now to attempt to assess what I would have awarded him if I had found that he was entitled to claim for overtime worked.

[53] The original Statement of Claim claimed $317,742.67 for overtime up until 14/1/16-why it stopped there I have no idea. If it was a proper claim then it would have continued for another 3 years or so up to today's date and alternatively would/should have been extended to the date of filing viz 27/4/16.

[54] That problem is however in view of my findings of academic interest only.

[55] Mr. Sylvester Carrott asks me more in hope than expectation to discount the claimed figure by 15-20%. The Defendants offer no such help.

[56] I have considered the evidence from the police records of key collection and return times and find them of limited assistance. I have also considered the Log books submitted, along with the schedule submitted by Mr. Brandt who acted upon his behalf; And find them unhelpful and unsupported.

[57] Doing the best that I can and bearing in mind that:

(i).The burden of proving loss lies upon the Claimant.

(ii)My finding that the Claimant exaggerates

And

(iii) the Claimant's evidence that his overtime was restricted in recent years.
I assess his overtime losses (if reclaimable) to have been about $100,000.00

[58] Costs to be prescribed.

[59] Interest to run from the date of Judgment.

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Gareth Evans QC
High Court Judge