[2010] JMCA Civ 30

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 2/2010

BETWEEN	**BLUE CROSS OF JAMAICA**	**APPELLANT**
AND	**VERONICA McGREGOR**	**RESPONDENT**

Written submissions filed by Marion Rose-Green & Co for the appellant and DunnCox for the respondent

9 July 2010

IN CHAMBERS

PROCEDURAL APPEAL

PANTON, P.

[1] This appeal is from a decision of Sinclair-Haynes, J on 23 July 2009, whereby she ordered the consolidation of suits 2004 HCV 2609 and CLM 137 of 2001. She also ordered the respondent to file and serve particulars of claim in respect of suit CLM 137 of 2001 by 30 July 2009, and the appellant (Blue Cross) to file and serve a further amended defence by 14 August 2009. The judge's order also dispensed with a case management conference in respect of suit CLM 137 of 2001, and the pre-trial review was set for 30 September 2009 with the expectation that such review would last no more than half an hour. Finally, the

learned judge also dismissed the respondent's application to dismiss suit CLM 137 of 2001 for want of prosecution.

[2] I have not been made aware of the reasons, if any, given by Sinclair-Haynes, J for her decision.

[3] The consolidated matters came on for trial on 11 November 2009. However, the trial did not take place. Instead, there was an adjournment to 6 and 7 October 2010. Page 76 of the "Index to Judge's Bundle" filed in the Court of Appeal on 26 March 2010 indicates that the trial did not take place as the court was otherwise engaged.

[4] On the said 11 November 2009, the record shows that the court's time was taken up with an application by Blue Cross to extend time to apply for leave to appeal, and also to apply for leave to appeal against the order of Sinclair-Haynes, J.

[5] Brooks, J who heard the applications, granted same on 29 December 2009. He gave written reasons justifying his order. His reasons have helped me to understand the case. Having granted the applications, he quite properly stayed the proceedings in CLM 137 of 2001 pending the outcome of this appeal.

GROUNDS OF APPEAL

[6] The grounds of appeal put forward by Blue Cross may be summarised as follows:

(a) The learned judge erred when she consolidated the claims seeing that:

(i) up to the time of her order no statement of claim had been filed in CLM 137 of 2001;

(ii) there was no application for extension of time to file same; and

(iii) no explanation was offered for the inordinate delay in filing the statement of claim and prosecuting the suit.

(b) The learned judge erred in ordering the filing and serving of particulars of claim as the writ of summons had expired and the suit had been automatically stayed seeing that no statement of claim had been filed.

(c) The learned judge erred in dismissing the application to dismiss CLM 137 of 2001 for want of prosecution as there is a substantial risk that the applicant's "long and inexcusable delay will increase the risk of ensuring that a fair trial is held". Severe prejudice has been caused, and will be caused to Blue Cross.

[7] In the result, it is the wish of Blue Cross that:

(a) suit CLM 137 of 2001 be dismissed for want of prosecution; and

(b) the particulars of claim and further amended defence filed pursuant to the 23 July 2009 order be struck out.

Consequently, suit 2004 HCV 2609 would, presumably, be allowed to proceed without let or hindrance in the usual way.

[8] The parties, through their attorneys-at-law, have filed full written submissions. I am grateful for same as they have greatly assisted me in the determination of the appeal.

THE CLAIMS

[9] The writ of summons in suit CLM 137 of 2001, filed on 31 July 2001, bears an endorsement indicating that the respondent is claiming for redundancy payments under The Employment (Termination and Redundancy Payments) Act and The Employment (Termination and Redundancy Payments) Regulations. As an alternative, she claims damages for breach of a contract of employment. In an amended defence, Blue Cross denies that any redundancy payment is due, or that there was any breach of contract for employment. Blue Cross also states that the last contract between the parties expired on 31 December 2000.

[10] In suit 2004 HCV 2609 filed on 5 November 2004, the respondent is seeking damages for wrongful dismissal arising from the termination of her employment with Blue Cross on or about 1 February 2000. The respondent had been employed to Blue Cross continuously since 1980. Alternatively, she is claiming damages for constructive dismissal. To that claim Blue Cross has filed a defence.

[11] In determining what should be the result of this appeal, it is important to observe that there is an inseparable relationship between both suits. It is very clear that they are in respect of the employment contract between the parties.

The respondent is aggrieved that her employment was terminated unjustifiably (in her view) and is accordingly seeking compensation. The close relationship between the suits makes them ideal for consolidation. The parties are the same and the issues are virtually the same, the main point being whether Blue Cross is liable to compensate the respondent in relation to the contractual relationship that existed between them. The absence of stated reasons by the learned judge cannot mask the fact that she must have considered these features. In making the order for consolidation, the learned judge seems to have exercised her discretion in a manner that cannot be faulted.

STATEMENT OF CLAIM NOT FILED

[12] So far as the 2001 suit is concerned, Blue Cross is relying on the old case of ***Murray and Another v Stephenson*** (1887) 19 Q.B. 60 to say that the endorsement is not a pleading, hence the claim should have been dismissed for want of prosecution. There is nothing wrong in relying on antiquity, but in this instance it is unhelpful. This unhelpful state exists because Blue Cross had absolutely no difficulty in filing a defence which was even amended later. To be now chomping in respect of the non-filing of a statement of claim is therefore rather hollow, it seems to me. Blue Cross, by filing a defence and amending it, has demonstrated that it understands the substance of the claim, and wishes to contest same. In my view, therefore, there is no merit in the complaint as regards the non-filing of a statement of claim.

PREJUDICE

[13] Blue Cross contends that there was inordinate delay in prosecuting the 2001 claim, and that this has resulted in prejudice to itself, and has blighted the prospects of a fair trial. According to Blue Cross, prejudice would result to itself as the employees in the Human Resource Department who would have been able to give evidence as to facts are no longer in the employ of Blue Cross. The result is that the available evidence, so it has been submitted by Blue Cross, "would amount to hearsay evidence which is not admissible under the Evidence Act".

[14] This submission by Blue Cross is strange. As counsel for the respondent has pointed out, the Evidence Act provides ample room for Blue Cross to present the evidence on which it intends to rely. As I see it, the witness statement of Jacqueline Cook filed on 9 October 2009 may be admitted in evidence as part of the case to be advanced by Blue Cross. It seems to me that if there were to be prejudice affecting either party, the respondent would be the unfortunate party as she may be hindered in her cross-examination. However, taking everything into consideration, no prejudice is likely to result to either party. The trial will take place before a judge sitting alone. The judges of the Supreme Court are quite capable of assessing evidence on paper just as well as they do when assessing viva voce evidence – assuming that there may be the need for such assessment, given the passage of time. Hence, there is no risk of the trial being unfair.

[15] The ground of appeal alleging the lack of validity of the writ of summons has not been substantiated. There is no evidence that the writ was not served within the required time frame. In the absence of evidence to that effect, that ground fails.

[16] In all the circumstances, I find that the grounds of appeal are without substance. That being so, the appeal is dismissed with costs to the respondent to be agreed or taxed.