

Balteano Duffus

Appellants

v.

National Water Commission

Respondents

FROM
**THE COURT OF APPEAL OF
JAMAICA**

REASONS FOR DECISION OF THE LORDS OF THE
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, OF THE
19TH April 2007, Delivered the 17th May 2007

Present at the hearing:-

Lord Hoffmann
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Lord Mance
Lord Neuberger of Abbotsbury

[Delivered by Lord Scott of Foscote]

1. This appeal from the Court of Appeal of Jamaica has been very well, and admirably succinctly, argued by Mr Colin Thomann, counsel for the appellant, but is a hopeless one. The appellant, Mr Duffus, was employed by the National Water Commission, a statutory body established under the National Water Commission Act of 1963, whose statutory function, shortly stated, was and is to supervise the provision of water supply services throughout Jamaica (see s.4 of the Act). Mr Duffus complains that by a letter of 28 May 1990 the Commission unlawfully

terminated his employment (para.5 of his Amended Statement of Claim). By a writ dated 9 March 1992 he commenced an action for damages for breach of contract. His action succeeded at first instance. Campbell J, in a judgment delivered on 2 July 2002, found in his favour. But the Court of Appeal, in a judgment of 20 December 2004, allowed the Commission's appeal and dismissed Mr Duffus' action. Mr Duffus has appealed to the Privy Council. His appeal was heard on Thursday 19 April 2007 but their Lordships, after hearing Mr Thomann, announced that the appeal would be dismissed for reasons to be given later. These are the reasons.

2. There are three issues on which their Lordships were addressed by Mr Thomann. In order for Mr Duffus' appeal to succeed he needs to succeed on each of them. The first issue is whether the termination by the Commission of Mr Duffus' employment was in breach of contract. The second issue arises out of section 2(1) of the Public Authorities Protection Act which provides that

“Where any action ... is commenced against any person for any act done in pursuance ... of any public duty ... or in respect of any alleged neglect or default in the execution of any such ... duty ...
(a) the action ... shall not lie or be instituted unless it is commenced within one year next after the act, neglect or default complained of ...”

Mr Duffus' cause of action for wrongful dismissal, if he has one, accrued on 28 May 1990. But he did not commence his action until 9 March 1992. So, the second issue is whether his action is barred by section 2(1) of the Act. Thirdly, there is an estoppel issue. Following the purported termination of his employment, Mr Duffus corresponded with the Commission about the financial benefits and pension to which he was entitled on his retirement. Agreement about these was reached, lump sum payments were accordingly made to Mr Duffus and from October 1990 he was paid a retirement pension. He continued to accept the pension payments until August 1999 when, following the institution of this action, the Commission suspended payment. If Mr Duffus' action succeeds he will be entitled to damages, in the quantification of which the pension payments already made will have to be brought into account. If his appeal is dismissed, he will be entitled to receive the suspended pension payments. The third issue is whether estoppel by convention, brought about by Mr Duffus' requests for and acceptance of retirement pension and other benefits is a bar to a damages claim based upon the contention that his employment was wrongfully terminated.

3. Both the first and third issues, and also to a lesser extent the second issue, require some reference to the basic relevant facts.

The facts

4. By a letter from the Commission dated 6 May 1986 Mr Duffus was appointed to the office of Director, Commercial Operations, with effect from 1 May 1986. The letter specified his salary entitlement and various other allowances, said that his confirmation in the office would be dependant on a satisfactory progress review of his appointment at the end of a six month probationary period but did not otherwise specify any contractual terms of his employment. Mr Duffus entered the Commission's employment accordingly. The confirmation of Mr Duffus' employment as Director, Commercial Operations, appears to have been overlooked and a letter from the Commission of 7 September 1989 put the record straight. This letter recorded the confirmation and set out the periodic increased salary scales and allowances that Mr Duffus had, presumably, been receiving since 1 January 1987.

5. But another letter from the Commission to Mr Duffus of the same date, 7 September 1989, said this:

“Consequent upon the restructuring of functional responsibilities within the Commission, it has been decided that you will be re-assigned to the post of Director, Corporate Planning – Finance (Gr.14) with effect from September 4, 1989. We wish you success in your new assignment”

Mr Duffus then began work in this new post. His salary and allowances remained unchanged. Another person was appointed Director, Commercial Operations.

6. However, by a letter dated 28 May 1990 from the Chairman of the Commission, Dr Wayne Reid, Mr Duffus was informed that the Commission was rationalising its operations with the consequence that some posts were to be abolished and some employees to be retired. The letter went on -

“Unfortunately, your position as Director, Corporate Planning has been abolished. Consequently, you are required to proceed on 105 days pre-retirement leave from 1 June, 1990, at the end of which you will be retired from the services of the Commission.

Attached please find a cheque representing forty per cent (40%) of your Commuted Allowance. Kindly contact the Manager, Personnel Services ... to finalise arrangements for payment of your retiring benefits.”

7. On receipt of the letter Mr Duffus proceeded to take pre-retirement leave as he had been advised to do and, having done so, embarked on correspondence with Dr Reid and other Commission officials regarding the various benefits and pension that were due to him on retirement. Thus, in an undated letter to Dr Reid in September 1990 Mr Duffus said that his pre-retirement leave should be treated as commencing on 4 June, not 1 June. He expressed a wish “to avoid any unnecessary delay in the computation and administration of [his] pension”. By a letter to the Commission of 5 January 1991 he said:

“Consequent on my retirement from the National Water Commission, effective October 30, 1990, I elect to receive a lump sum and reduced pension as enclosed forms, duly completed, indicate.”

He asked for an advance of \$72,000 on his lump sum. It seems that Mr Duffus, before he wrote his 5 January 1991 letter, must already have indicated that he would elect to receive a commuted lump sum and a reduced pension, for on 4 October 1990 the Commission had written to the Permanent Secretary of the Ministry of Public Services informing him that Mr Duffus would retire from its service on 31 October 1990 and giving details of the reduced pension and commuted lump sum that Mr Duffus had elected to receive. The letter requested the Ministry’s approval for the payment of these retirement benefits.

8. The correspondence between Mr Duffus and the Commission dealt also with the question whether Mr Duffus was entitled to a payment in lieu of a period of recreational leave. A claim to be entitled to 41 days’ recreational leave had been made by Mr Duffus in his undated letter of September 1990 but had been refused. This issue was finally referred to Dr Reid who, in a letter to Mr Duffus dated 16 October 1990, said, under the heading “Recreational Leave”, that Mr Duffus had been paid in lieu of the recreational leave to which, apparently, he had become entitled in 1989. The letter then went on, under the heading, “Position of Director, Corporate Planning” to make some remarks on which great reliance has been placed by Mr Duffus. It is convenient to set them out in full. Dr Reid said this:

“The position of Director, Corporate Planning was an interim organisational structure, was not an approved budgetary position as it was not yet gazetted and therefore is not considered part of the establishment. Under the circumstances the question of entitlement is therefore not relevant.”

Dr Reid’s letter of 16 October 1990 was expressed to be “Further to my letter of 21st September, 1990”. No such letter from Dr Reid to Mr Duffus appears to exist.

Dr Reid gave evidence at the trial but was not asked whether he had written a letter of that date. He said in evidence that his letter of 16 October 1990 had been written in response to Mr Duffus' "undated letter received September 1990". In the circumstances their Lordships are inclined to think that the reference to "my letter" was simply a mistake and that Dr Reid was intending to refer to Mr Duffus' letter which he may well have received on 21 September 1990. If that surmise is right, the passage last cited must be read as Dr Reid's response to the last paragraph of Mr Duffus' undated September letter in which Mr Duffus had asked questions about the abolition of the position of Director, Corporate Planning, and expressed concerns about his entitlements:-

"What is the effective date of the abolishment? Does the Budget for Financial Year April 1990 to March 1991 carry the position of Director, Corporate Planning? This matter needs urgent clarification because it raises serious questions re the privileges to which I am entitled while I remain on the Commission's payroll. Also, and equally important, I wish to avoid any unnecessary delay in the computation and administration of my pension."

It may be that these questions prompted the Commission's letter of 4 October 1990 to the Ministry of Public Services.

9. At the same time as Mr Duffus was carrying on correspondence with the Commission about his retirement pension and benefits, and was accepting payment of both, solicitors instructed by him were writing to the Commission insisting that Mr Duffus still retained the office of Director, Commercial Operations. They wrote letters to that effect on 17 December 1990 and again on 12 July 1991. It appears to be accepted, however, that Mr Duffus' employment with the Commission had terminated at the end of October 1990. His letter of 5 January 1991 gives 30 October 1990 as the termination date and the particulars included in paragraph 6 of his Statement of Claim claim damages as from that date. And the Commission's letter of 4 October 1990 to the Ministry gives 31 October 1990 as Mr Duffus' retirement date.

The first issue

10. A convenient starting point is to recognise, as Dr Reid made clear in his letter of 16 October 1990, that the post of Director, Corporate Planning, was not, unlike the post of Director, Commercial Operations, an establishment office. It was a post informally created by the Commission for a particular purpose, namely, corporate and strategic planning (see Mr Duffus' evidence at p.24 of the Record). It was contended on behalf of Mr Duffus that, notwithstanding his acceptance of

his assignment to this new ad hoc office, he had remained Director, Commercial Operations. This is an untenable contention. Someone else, following his assignment to the new ad hoc office, had been appointed Director, Commercial Operations, and had held and discharged the duties of that office throughout the period that Mr Duffus had been Director, Corporate Planning. It is, in their Lordships' opinion, clear that the two letters of 7 September 1989, read together, had the result that Mr Duffus was, first, confirmed in the office of Director, Commercial Operations, and then moved from that office to the post of Director, Corporate Planning, with new duties but on the same terms as to salary and other allowances. What would have happened if Mr Duffus had declined to accept the re-assignment may be open to debate, but is irrelevant for he did not so decline. He accepted the re-assignment and discharged the duties of his new post until he received the letter of 28 May 1990.

11. It is then argued that in terminating his new post and requiring him to take early retirement the Commission were in breach of contract. That, of course, depends on what the contractual terms of his employment were. The letter of 6 May 1986, pursuant to which Mr Duffus had entered the Commission's employment, had said nothing about the terms on which he could be dismissed. Paragraph 11 of the 1st Schedule to the National Water Commission Act provides that

“The Commission may appoint and employ at such remuneration and on such terms and conditions as it thinks fit, a Secretary, and such officers, agents and servants as it considers necessary for the proper performance of its functions.”

And paragraph 12 of the Schedule enables the Commission, with the approval of the Minister, to make regulations determining generally the conditions of service of officers or servants of the Commission. But it appears that no regulations relating to the termination of employment contracts had been made. In these circumstances the general law of contract must fill the gap. Under the general law, and subject to any express contractual provision or statutory provision to the contrary, employment contracts may be terminated by either party on giving reasonable notice. The letter of 28 May 1986 gave Mr Duffus 105 days' notice and no one has suggested that that was not reasonable notice. In the event Mr Duffus' employment was treated as continuing until the end of October, a period of 5 months from 1 June when, according to Mr Duffus, he received the 28 May letter.

12. The trial judge, Campbell J, treated Regulation 25(1) of the Public Service Regulations as incorporated into Mr Duffus' employment contract. He did so partly because Ms Sharon Fender, employed by the Commission as Operations Supervisor, had given evidence that "the rules of Civil Service were used by the Commission in respect of the terms and conditions of service" and that "where there were no rules, the Commission would look to the Civil Service", and partly because, as the judge put it, "they [should] be incorporated to give efficacy as the parties must have intended". Regulation 25(1) lays down the procedure to be followed "where a post (being one of a number of like posts) has been abolished but one or more of such posts remains". The judge held that since the Regulation 25(1) procedure had not been followed Mr Duffus had been wrongfully dismissed. This reasoning cannot be accepted. First, the post of Director, Corporate Planning, was not "one of a number of like posts", so Regulation 25(1) would not, even if it had formed part of the contract, have been applicable. Second, the evidence of Ms Fender did not go anywhere near to establishing an implied agreement between Mr Duffus and the Commission that Regulation 25(1) should be incorporated into their contract and, third, the only term relevant to the facts of this case that needed to be implied in order to give efficacy to the contract under which Mr Duffus had been employed was a term requiring reasonable notice to be given for a dismissal.

13. In the Court of Appeal, Harrison JA, with whose judgment Forte P and Smith JA agreed, said that there was no evidence before the learned trial judge that could have caused him to arrive at the conclusion that Mr Duffus' dismissal was "in disregard of the contractual arrangements between the parties". Their Lordships are in complete and respectful agreement.

The second issue

14. The trial judge rejected the defence that the action was statute barred pursuant to the Public Authorities Protection Act. He did so because "the actions of the [Commission] cannot be said to have been done in execution of the purpose of the [National Water Commission Act]". Their Lordships find this an astonishing conclusion. The abolition of the post of Director, Corporate Planning, was expressed to be done "to rationalise the operations" of the Commission. The chairman's letter of 28 May 1990 said that "This rationalisation exercise makes it necessary for some posts to be abolished or made redundant and for some employees to be retired". No suggestion was made at trial that this had not been the reason why the post of Director, Corporate Planning, had been abolished and why Mr Duffus had been required to take early retirement. And how can it be suggested that steps taken to improve the efficiency of the discharge by the Commission of its statutory functions are taken otherwise than in execution of its statutory purposes? The judge went on to say that Dr Reid had to be "imputed

with knowledge” that the actions taken by the Commission regarding the pension and other retirement benefits to be paid to Mr Duffus were *ultra vires* the relevant pension rules and that Dr Reid “could not honestly have believed that they were sanctioned by some authority”. These strictures were wholly unjustified. First, the Commission wrote to the Ministry of Public Services to obtain approval of the retirement pension and other benefits proposed to be paid to Mr Duffus. Second, no allegation against Dr Reid of lack of honesty or of *bona fides* is to be found in Mr Duffus’ pleadings and, thirdly and very properly, no such allegation was put to him in cross-examination.

15. The Court of Appeal dealt very shortly with this point. The cause of action for wrongful dismissal upon which Mr Duffus was suing had accrued on 28 May 1990. The action had not been commenced until 9 March 1992. The interval was in excess of one year. So the action was barred by section 2(1) of the Public Authorities Protection Act. Their Lordships agree. Nothing more needed to be said.

The third issue

16. *Amalgamated Investment & Property Co. Ltd. v Texas Commerce International Bank* [1982] QB 84 provides authority for the proposition, stated in Spencer Bower and Turner’s *Estoppel by Representation* 3rd Ed. p157, that

“When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped against the other from questioning the truth of the statement of facts so assumed.”

The circumstances under which the pension and other retirement benefits were paid by the Commission to Mr Duffus and were accepted by him would appear at first blush to make it very difficult for him to deny the truth of the basis on which the moneys were paid, namely, that he had retired from his employment with the Commission at the end of October 1990. However, the application of estoppel by convention as a defence is notoriously fact sensitive and their Lordships prefer in the present case to express no final conclusion on this issue.

17. In the result their Lordships will humbly advise Her Majesty that this appeal shall be dismissed with costs.