



[2023] JMSC Civ

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2022CV03442

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| BETWEEN | DENISE HYLTON | APPLICANT |
| AND | PETER THOMPSON | RESPONDENT |

IN CHAMBERS

Mr. Hugh Wildman instructed by Hugh Wildman & Co., Attorneys-at-Law for the Applicant

Messrs Patrick Foster, KC and M. Cowan instructed by the Nunes, Scholfied & DeLeon, Attorneys-at-Law for the Respondent

HEARD: January 17 & 24, 2023

APPLICATION TO STRIKE OUT – MISJOINDER OF RESPONDENT – APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

WINT-BLAIR, J

[1] The application filed by Mr Foster, KC is an application to strike out the application for leave for judicial review. It is filed without a supporting affidavit. Mr Foster, KC submits that the court is being asked to decide a point of law and any

evidence to be relied on is to be found in the evidence of the applicant in her application for leave to apply for judicial review.

[2] Mr Foster, KC argued that there are no reasonable grounds for proceeding in this matter against the respondent. The applicant is undisputedly an employee of a public body. She has not sought leave to quash the decision of that body. Rather, the application is misconceived and completely without merit as against Peter Thompson, who is an employee of the public body. The application is bad for misjoinder as it is against her employer the statutory body that she ought to proceed.

[3] Further, he submits that there was no legal basis for the application to have been filed in this way. It is the employer/statutory body who bears the burden of orders or any declaratory relief ordered by the court. Moreover, in judicial review proceedings, any compliance must come from the statutory body making the decision. The application should therefore be struck out on the clear ground of misjoinder.

[4] In response Mr. Wildman submitted that judicial review is against the decision maker. The letter demoting his client came to the applicant from the respondent. For the purposes of judicial review proceedings, he is the decision maker as the person purporting to make the impugned decision. He cited the case of **Arthurine Webb v Donovan Stanberry**¹ in which Ms. Webb was the Human Resources Manager at the Ministry of Agriculture. She was removed from her position by letter signed by the Permanent Secretary who was the named respondent. In that case, the learned judge granted a stay and made the orders sought by the applicant.

¹ [2019] JMSC Civ 100

[5] Further, the letter in dispute did not come from the Public Service Commission, and the principles of judicial review do not allow for the principles of agency.

[6] Mr Foster responded by saying that the Ministry of Agriculture is not a statutory body as is the employer in this case, which has a Board and this is clear from the evidence of the applicant in her affidavit. In the **Webb** case, the respondent was the Permanent Secretary who had responsibility for administration and quasi-judicial powers were reposed in him. He executed a range of decisions on behalf of the Ministry of which he was the head. The case is distinguishable from the instant case in which the applicant is an employee of a statutory body to which the respondent is also employed. The statutory body concerned is the Jamaica Commodities Regulatory Authority established by the Agricultural Commodities Regulatory Authority Act.

DISCUSSION

[7] It is undisputed that the applicant is an Internal Auditor and the respondent the Director General, both are employed to the Authority. The applicant received a letter signed by the respondent which said she was to be re-assigned her temporarily to the shipping department of the same Authority.

[8] The only similarity between the case of **Arthurine Webb v Donovan Stanberry** cited to this court are these facts from that decision. *“In April 2018, the Claimant received a letter dated 4 th April, 2018 signed by the Defendant; the letter sought to inform her that she was placed on retirement on the ground of re-organization effective March 31,2018.”* The decision is otherwise unhelpful in deciding the instant application.

[9] It is not in dispute that the applicant in the instant case was employed to the Jamaica Agricultural Commodities Regulatory Authority, a body corporate established by section 3 of the Agricultural Commodities Regulatory Authority Act, 2017, to which section 28 of the Interpretation Act applies. It has a Board of Directors established by section 6 of the said Act.

[10] By section 5(1) the Authority may delegate, in writing any of its functions under the Act other than the power to make regulations or the power of delegation to the Director General or to any other member, officer, employee or agent of the Authority.

[11] By section 11, the Authority may appoint and employ officers or employees.

[12] The Governor General may appoint officers to the Authority and the Minister of Agriculture may after consultation with the chairman of the Board five policy directions to the Authority.

[13] The submission was made that the applicant did not receive a letter from the Public Service Commission and the court notes that this submission is without an evidential basis based on the applicant's affidavits before the court.

[14] The applicant relies on a letter from the Permanent Secretary in the Ministry of Agriculture which states that there are grievance procedures in place for the Authority. There is scant evidence in the applicant's further affidavit as to this. The matter is said by the Permanent Secretary to be within the remit of the Board of Directors of the Authority and there is no evidence as to what has transpired between the Board and the applicant. She deposes that she has not been reinstated without more.

[15] There is no application to substitute parties before this court, nor is there an application to amend the pleadings. Each side stands on their oral submissions. I will rely on the case of **Gladston Watson v Rosedale Fernandes**² in which the Caribbean Court of Justice ("CCJ") considered the legal effect of procedural irregularities. The CCJ considered that breaches of procedural rules should not deprive a litigant of the

² [2007] CCJ 1 (AJ),

opportunity for his case to be heard. The court referred to the statement of Wooding CJ in **Baptiste v Supersad and Montrose**³ which said that:

“The law is not a game, nor is the court an arena. It is ... the function and duty of a judge to see that justice is done as far as may be according to the merits.”
(page 144)

STRIKING OUT

[16] Rule 26.3 of the Civil Procedure Rules is set out below:

“26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –
(a) that there has been a failure to comply with a Rule or practice direction or with an order or direction given by the court in the proceedings;

(b) that the statement of case or the 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;

(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or

(d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10.”

[17] McDonald Bishop JA in the case of **Commissioner of Lands v Homeway Foods and another**⁴ summarized the principles under this head as follows:

³ (1967) 12 WIR 140

“(i) Strike out orders should be made either when that is necessary in order to achieve fairness or when it is necessary in order to maintain respect for the authority of the court’s orders. In this context, fairness means fairness not only to the non-offending party but also to other litigants who are competing for the finite resources of the court.

(ii) If there is a real risk that a fair trial may not be possible as a result of one party’s failure to comply with an order of the court, that is a situation which calls for an order striking out that party’s case and giving judgment against him.

(iii) The fact that a fair trial is still possible does not preclude a court from making a strike out order. Defiant and persistent refusal to comply with an order of the court can justify the making of a strike out order. While the general purpose of the order in such circumstances may be described as punitive, it is to be seen not as retribution for some offence given to the court but as a necessary and, to some extent, a symbolic response to a challenge to the court’s authority, in circumstances in which failure to make such a response might encourage others to disobey court orders and tend to undermine the rule of law. This is any type of disobedience that may properly be categorized as contumelious or contumacious.

(iv) It must be recognised that even within the range of conduct that may be described as contumelious, there are different degrees of defiance, which cannot be assessed without examining the reason for the non-compliance.

(v) The previous conduct of the defaulting party will obviously be relevant, especially if it discloses a pattern of defiance.

⁴ [2016] JMCA Civ 21 at para. [52]

(vi) It is also relevant whether the non-compliance with the order was partial or total.

(vii) Normally, it will not assist the party in default to show that non-compliance was due to the fault of the lawyer since the consequences of the lawyer's acts or omissions are, as a rule, visited on his client. There may be an exception made, however, when the other party has suffered no prejudice as a result of the non-compliance.

(viii) Other factors, which have been held to be relevant, include such matters as (a) whether the party at fault is suing or being sued in a representative capacity; and (b) whether having regard to the nature of the relief sought or to the issues raised on the pleadings, a default judgment can be regarded as a satisfactory and final resolution of the matters in dispute.

(ix) Regard may be had to the impact of the judgment not only on the party in default, but on other persons who may be affected by it."

[18] The previous conduct of the defaulting party should be relevant especially if it discloses a pattern of defiance, it is clear that a holistic approach is the correct one. It is also relevant whether the non-compliance with any order was total or partial.

[19] The guiding principles regarding an order for striking out are that of justice and fairness. Further to this, an order for striking out must only be utilized as a last resort and this court is aware that it is encouraged in the authorities to first use alternative powers to an order for striking out.

THE OVERRIDING OBJECTIVE

[20] Although the court's discretion under Rule 26.3 seems unfettered, it must be exercised subject to the overriding objective set out in Rule 1.1 of the CPR which, in essence, is the duty of the court to deal with the case justly. This means that the most

draconian sanction ought to yield to lesser alternatives. In **Gladston Watson**, the CCJ opined that:

“Courts exist to do justice between the litigants through balancing the interests of an individual litigant against the interest of litigants as a whole in a judicial system that proceeds with speed and efficiency.... Justice is not served by depriving parties of the ability to have their cases decided on the merits because of a purely technical procedural breach committed by their attorneys.”

[21] I adopt unreservedly the dicta of the learned Judges of the CCJ. The decision of counsel for the applicant to proceed in the way that he has, engages factor number seven in the summary at paragraph [7] above. There was no evidence of prejudice to the respondent presented to the court, therefore this case falls into the category of those for which an exception can be made.

[22] Having reviewed the authorities and the submissions, I find that in the circumstances, the court has the power to cure the defect by the application of Rule 56.4(6). However, counsel for the applicant has not taken this position, nor has he prevailed upon the court for any relief by filing an application to amend the pleadings or by seeking such relief on the hearing of this application. The application is hereby disposed of as follows:

[23] ORDERS

1. The application to strike out the application for leave to apply for judicial review is granted.
2. Costs of the application awarded to the respondent to be agreed or taxed.