

N/MLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 91 OF 2002

BEFORE: THE HON. MR. JUSTICE FORTE, P
THE HON. MR. JUSTICE SMITH J.A.
THE HON. MR. JUSTICE HARRISON J.A (Ag.)

BETWEEN: NATIONAL WATER COMMISSION

1st DEFENDANT / APPELLANT

AND BALTEANO DUFFUS

PLAINTIFF/ RESPONDENT

**Andre Earle and Miss Sheryl Thompson instructed by Rattray Patterson
Rattray for the Appellant**

Bert S. Samuels instructed by Bert Samuels and Co. for the Respondent

April 26, 27, 29, May 3, and December 20, 2004

HARRISON J.A. (Ag):

This is an appeal from the judgment of Campbell J. delivered on the 2nd July 2002, following the hearing of an action for breach of contract of employment. It was alleged by the plaintiff/respondent (the respondent) that the defendant/appellant (the appellant) had wrongfully terminated his employment. At the conclusion of the trial, the learned trial judge found for the respondent and made the following order:

"The plaintiff is entitled to damages in a sum equivalent to the salary he would have earned for

the period from the 30th October, 1990 to 31st December 1993. This sum to include all allowances that he was in receipt of up to his lawful retirement. Including a sum to represent the loss of use of any motor vehicle he was legally entitled to. The Court orders that he be compensated in lieu of all vacation leave for which he would have been entitled had he been at work during the said period. His retirement will be computed on the basis that the last post he held was that of Director of Commercial Operations, up to the 31st day of December, 1993. The funds dispersed to the Plaintiff on his unlawful retirement will offset from the damages due to the Plaintiff. Costs to the Plaintiff on the claim and counterclaim."

The facts surrounding the alleged dismissal:

The respondent is a Management Consultant and is the holder of a first degree in Management Studies and a Masters degree in Business Administration. He specializes in Management Information Systems.

He was formerly employed to the Ministry of Agriculture but was transferred to the National Water Commission (the "N.W.C.") in or around 1980. He was granted study leave by the N.W.C. to pursue his Masters degree in Business Administration in Canada and after successfully completing that degree he returned to the N.W.C. in 1985. He was appointed Manager of Cost Accounting in 1985. On the 1st January 1987, he was promoted to act in the post of Director of Commercial Operations.

The respondent contends that the Managing Director of the N.W.C. told him in a meeting that there were plans to improve the operations of the Commission and they needed someone to carry out a special assignment in the area of Corporate and Strategic Planning. He said the issue of his tenure came

up for discussion and he informed the Managing Director that he did not wish to be assigned to any other responsibility until he was confirmed in his acting appointment. He was confirmed in the post of Director of Commercial Operations by letter dated 7th September 1989. The appointment was retroactive to January 1, 1987.

The respondent was re-assigned to the post of Director of Corporate Planning in the N.W.C. His letter of appointment dated September 7 1989, states as follows:

"Dear Mr. Duffus

Consequent on 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."

As a consequence of the respondent's re-assignment, Ms. Violet Reynolds was appointed to the post of Director, Commercial Operations on the 4th September 1989. Ms. Florence Logan succeeded Ms. Reynolds in this post after she retired.

The respondent was further advised by letter dated 28th May 1990 from the Chairman of the N.W.C, that the post of Director, Corporate Planning – Finance(Grade 14) was abolished. In the circumstances, he was sent on one hundred and five (105) days pre-retirement leave with effect from June 1, 1990. His retirement commenced as of October 30, 1990. The letter of the 28th May 1990 (Exhibit 4) states inter alia:

"Dear Mr. Duffus

The National Water Commission, by necessity, must effect changes that will improve the efficiency of its operation and the need for this has been accelerated because of the poor economic conditions in which we have found ourselves.

It is against this background that the Board of the Commission has taken the decision to rationalize the operations of the Organization by embarking on a staff reduction exercise. This rationalization exercise makes it necessary for some posts to be abolished or made redundant and for some employees to be retired.

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

Attached please find a cheque representing forty percent (40%) of your commuted allowance. Kindly contact the Manager, Personnel Services, 14-16 Trinidad Terrace, Kingston 6 to finalize arrangements for payment of your retiring benefits.

.....

Sgd. Wayne C. Reid
Chairman".

The respondent further testified that he took no immediate action upon receipt of the above letter. He said he was unsure of his status and thought he would have been reverted to his former post of Director of Commercial Operations on the abolition of the post of Director of Corporate Planning. He eventually obtained the services of an Attorney at Law and commenced legal proceedings in the Supreme Court on the 9th March 1992.

The Grounds of Appeal

Leave was granted for the appellant to argue the following amended grounds of appeal:

"1. The learned trial judge erred in law and in fact in giving judgment for the plaintiff on the Claim as those findings are not sustainable in law and are against the weight of the evidence, having regard to the doctrines of Estoppel, Waiver, Election and/or Approbation and Reprobation, and the following unchallenged evidence:

- i) The Plaintiff's inter office memorandum dated July 4, 1990.
- ii) Undated letter from plaintiff to 1st defendant received 19 September 1990.
- iii) Plaintiff's letter dated January 5, 1991 to 1st defendant.
- iv) 1st defendant's letter to the Ministry of the Public Service attaching plaintiff's letter dated 19th March 1991, and
- v) Plaintiff's letter dated 18th April 1991.

2. The learned trial judge erred in law and fact in finding that the plaintiff/respondent was wrongfully dismissed and in finding that the plaintiff's substantive post was Director of Commercial Operations having regard to the evidence that by letter dated September 7, 1989, the plaintiff was re-assigned to the post of Director, Corporate Planning (Grade 14). Alternatively, if the plaintiff/respondent held the post of Director, Commercial Operations, the learned trial judge erred in law in finding that he was wrongfully dismissed therefrom on the 28th May 1990 or at all.

3. The learned trial judge erred in law in finding that the premature retirement of the plaintiff was unlawful having regard to the evidence that the plaintiff sought to clarify his pre-retirement leave entitlement.

4. The learned trial judge erred in law in finding that the 1st defendant's actions are not protected by the limitation period, in that, the action was not instituted within the one-year limitation period prescribed for acts done in pursuance of the Public Authorities Protection Act.

5. The learned trial judge erred in law and in fact by failing to state a specific sum to which the plaintiff was entitled for damages by virtue of which the said judgment is imprecise, vague, uncertain and incapable of enforcement."

The respondent filed a notice and grounds of appeal and seeks an order for the judgment to be varied as follows:

"1. That the learned trial judge erred when he ruled that the Contract of Service for the plaintiff/respondent could have been terminated lawfully in December 1993.

2. The learned trial judge ought to have ruled that the contract still subsists and was not lawfully terminated at any time.

3. The learned trial judge erred when he ruled that the plaintiff/respondent had accepted the termination of his Contract when he started to seek employment.

4. The learned trial judge erred by not ruling that interest charges be applied to all payment due to the plaintiff/respondent from the 1st defendant from the first date they become due until the date they are paid.

5. The learned trial judge erred by ruling that damages should be limited to the loss of salary and associated allowances only.

6. The learned trial judge ought to have ruled that the plaintiff is entitled to damages in a sum equivalent to include all salary and associated allowances, other employment benefits and pension cost".

THE RESPONDENT THEREFORE PRAYS THAT THIS HONOURABLE COURT WILL ORDER:

1. That having regard to the fact that the contract still subsists the Court orders that the defendant/appellant pay to the respondent/plaintiff all the emoluments due to him from the 30th October, 1990 until present and continuing and provisions for pension or in the alternative.
2. That the defendant/appellant pays such damages for breach of contract as this Honourable Court deems fit in all the circumstances having regard to the fact that the defendant/appellant could have properly retired the respondent/appellant: the 7th of March, 2003 on the attainment of his 55th birthday. That is to say:
 - a) Salary at maximum of grade 14 salary scale for the period October 30, 1990 to March 6 2003. Duffus was already at maximum of grade 14 scale at time of unlawful dismissal.
 - b) All allowances to which Duffus was entitled at effective date of wrongful dismissal.
 - c) An allowance of \$30,000.00 monthly in lieu of a motor vehicle.
 - d) Payment in lieu of vacation leave to which Duffus would have been eligible had he been working during the period October 30, 1990 to March 6, 2003.
 - e) A lump sum for lost pension for the period March 7 to March 6, 2018. The amount would be computed on the basis of the maximum of the Grade 14 salary as at March 6, 2003.

Interest rate of 15% per annum to be applied to all amounts from the date they became due."

GROUND 1, 2 and 3

Was sufficient notice given by the appellant when the contract of employment was terminated?

Grounds 1, 2 and 3 were argued together by Mr. Earle.

The cause of action was one for breach of contract of employment, so, in order for the respondent to succeed he would have had to satisfy two conditions, namely:

- (a) That he was engaged for a fixed period terminable by notice and was dismissed before the expiration of that fixed period or without the requisite notice; and
- (b) That his dismissal is unlawful.

I will now deal with the first limb. The respondent presented no evidence regarding the terms of his contract of employment so one does not know whether it was for a fixed period and if so, what length of notice was required in order to end the contract of employment. The learned trial judge stated at page 21 of his judgment that "the retirement was done in disregard of the contractual arrangements between the parties" but there was no evidence before the learned trial judge that could have caused him to arrive at this conclusion. In the circumstances, I agree with the submissions of Mr. Earle and hold that sufficient notice was given to the respondent when he was placed on 105 days pre-retirement leave prior to his retirement becoming effective.

Was the respondent wrongfully and/or unlawfully dismissed?

I now turn to examine the background evidence leading up to the effective retirement. A major re-structuring exercise had taken place at the N.W.C and a decision was taken by the Board to rationalize its operations by embarking on a staff reduction exercise. This decision made it necessary for some posts to be

abolished or made redundant and for some employees to be retired. Unfortunately for the respondent, the post of Director, Corporate Planning to which he was re-assigned was abolished and he was asked to proceed on retirement leave.

The respondent sought to clarify his pre-retirement leave entitlement after he received the letter of the 28th May 1990. His un-dated letter to the appellant states inter alia:

"...I was unable to commence my leave on June 1, 1990 as the Commission intended. Unfortunately, I first knew of the Commission's decision during our (Reid/Duffus) meeting which you scheduled for June 1, 1990, the day my leave should have commenced. Later that day, the Managing Director gave me the letter containing the Commissioner's decision and instructions. It would seem reasonable, therefore, to ask that the Commission amends its records to reflect June 4, 1990 as the day my leave commenced.

In addition to the 105 days vacation leave I am entitled to 41 days recreational leave which I earned in 1985, and never took, following two years study leave.

Your letter states that the position of Director Corporate Planning has been abolished. 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 un-necessary delay in the computation and administration of my pension."

The Chairman of the N.W.C replied to this un-dated letter on the 16th October 1990, and he informed the respondent that the post of Director, Corporate

Planning was an interim one, that it was not gazetted and therefore was not considered part of the establishment.

The respondent's Attorneys at Law, Burnham Scott & Co., had also written to the appellant about the respondent's recreational leave benefits. The letter dated 14th November 1990 (Exhibit 7) states inter alia:

"... your letter dated November 1, 1990 to Mr. Duffus responding to his request for forty-one (41) days recreational leave has been passed on to us with instructions to pursue the matter on his behalf ...

We are therefore requesting that the Commission's records be corrected with regard to the forty-one (41) days recreational leave and that our client be afforded all the benefits due him in his capacity as an employee on leave, especially in regard to the continued use of the motor car assigned to him."

The respondent had also written to the appellant regarding his free passage pursuant to the Staff Orders. The letter dated December 4, 1990 states inter alia:

"...in the interim my family and I have travelled to the United States of America. Please make payment in favour of International Travel Services Ltd. to cover my spouse, two children and myself".

In January 1991 the respondent wrote to the appellant electing to receive a lump sum payment and reduced pension. His letter of the 5th January 1991 (Exhibit 12), states:

"Consequent on my retirement from the National Water Commission effective October 30, 1999, I elect to receive a lump sum and reduced pension as the enclosed forms, duly completed indicate.

Recognizing the time it usually takes to administer pensions, I hereby request a carrying-on allowance in

the form of an advance of \$72,000.00 on my total commuted allowance which I calculate as \$189,459.63...."

In April 1991, he further requested an advance of \$130,000.00 from his retirement benefit. The letter dated April 18, 1991 (Exhibit 13) states inter alia:

"I am seeking your approval for the full disbursement of the \$130,000.00 approved as an advance on my gratuity...

I am proposing therefore, that:

(a) The full \$130,000.00 be disbursed to me now;

(b) On formal approval of my pension, the Commission retains the full \$94,000.00 owing on my gratuity to offset against the debt of \$124,699.00.

(c) The Commission recovers the balance of \$30,699.00 through deductions from my monthly pension allowance.

(d) ..."

On the 26th March 1991, the Permanent Secretary, Ministry of the Public Service – Pension Branch, advised the Managing Director of the N.W.C. that the advance that was requested by the respondent was recommended for payment.

This letter (Exhibit 14) states inter alia:

"26th March 1991

Sir,

I hereby recommend payment to Mr. Balteano Duffus, formerly Director in the National Water Commission, of an advance in the sum of One Hundred and Thirty Thousand Dollars (\$130,000.00) together with an alimentary allowance at the rate of Thirty Thousand Dollars (\$30,000.00) a year payable with effect from the 30th of October, 1990 provided he is ..."

Mr. Earle submitted that when all the circumstances relating to the retirement of the respondent are taken into consideration, the evidence clearly shows that he had accepted the retirement benefits so he is precluded from saying that he has suffered loss. He relied strongly on the doctrines of estoppel, waiver, election, approbation and reprobation and submitted that the respondent must be taken as having abandoned any entitlement under his former position and is therefore estopped from making a claim.

Mr. Samuels submitted on the other hand, that section 13(2) of the National Water Commission Act, was very pertinent to this appeal. The section provides as follows:

"13(2) All new posts, and any variation in the salary of an existing post, shall be subject to the specific approval of the Minister."

He argued that since there was no approval for the creation of the post of Director, Corporate Planning its creation was illegal and formed no basis upon which the retirement of the respondent could be based. He submitted that the post could not attract pension rights in view of the provisions in section 2 of the National Water Commission (Pensions) Regulations, 1968 which provides:

"In the Regulations –

'pensionable office' means an office for which separate provision is made in the annual estimates of the Commission and which has been declared to be pensionable by resolution of the Commission approved by the Minister and notified in the Gazette".

Mr. Samuels further submitted that due to the illegality in the creation of the post, all acts done with regard to the abolition of that post were null and void and of no effect. In the circumstances, he contended that:

1. The respondent would not be eligible for a pension or any associated benefits if he was retired on the basis relied on by the appellant.
2. The appellant could not rely on the alleged acceptance of the payments that were made and which purported to be pension payments when in law they were not.
3. The unlawful termination of the respondent caused him to lose his emoluments and all relevant benefits.
4. The doctrines of estoppel, waiver, election, approbation and reprobation would be inapplicable to the facts of the case.

The learned trial judge in dealing with the legality of the abolition of the post said at page 11 of the judgment:

"Although the plaintiff was granted a pension, such a grant was not permitted if the plaintiff occupied the non-gazetted post of Director of Corporate Planning as alleged by the defendants. The grant of a pension to the plaintiff was therefore in breach of the regulations on the defendant's case. The post of Director of Corporate Planning was not gazetted. There is no evidence that it was declared pensionable by a resolution of the Commission and approved by the Minister and notified in the Gazette.

The Chairman describes it as an "interim organizational structure", not an approved budgetary structure. It therefore begs the question, which audit

or analysis found it necessary to abolish this post in order to improve the efficiency of the National Water Commission's operation as the Chairman's letter of the 28th May 1990 explains? When was this audit or analysis done? Was it before the plaintiff was re-assigned to it? If yes, why was he then re-assigned"?

At page 12 of the judgment the learned trial judge continues:

"In those circumstances, the criticism of Counsel that this is a "dismissal masquerading as a retirement would be pertinent. If the recommendation was done after the assignment of the plaintiff were the Consultants advised that it was merely "interim" and was not a burden on the National Water Commission's budget? Importantly, the interim status of the Director of Corporate Planning supports the plaintiff's contention that he was never appointed to that post. The Chairman's letter of 28th May 1990 supports the plaintiff. It follows therefore, that the plaintiff's substantive post would be as he alleged, that is, the Director of Commercial Operation. And I so hold."

Finally at page 21 the learned trial judge concluded:

"The purported termination of the plaintiff's appointment on the ground of abolishment of the post was wrong. Even if there were statutory authority for abolishing the post of Director of Corporate Planning, and I find there was none, the premature retirement of the plaintiff was without statutory authority and is therefore unlawful. Further, the retirement was done in disregard of the contractual arrangements between the parties".

I wish to make some general observations about the doctrines of estoppel, waiver, election, approbation and reprobation. All share a common foundation in a simple instinct of fairness, and in particular, the perception that as between two parties to a transaction or a legal relationship it is or may be unfair for one party (A) to adopt inconsistent positions in his dealings with the other (B). As Lord Wilberforce said in *Johnson v Agnew* [1979] 1 All ER 883 at 894:

"Election, though the subject of much learning and refinement, is in the end a doctrine based on simple considerations of common sense and equity." Equitable (or promissory) estoppel applies only where there is an unequivocal representation (in words or conduct) by A and it is relied on by B".

But as Stephenson LJ said in *Peyman v Lanjani* [1984] 3 All ER 703 at 724:

"When a party has legal advice, he will be more easily presumed to know the law and evidence or special circumstances may be required to rebut the presumption ...".

In Halsbury's Laws of England, 4th Edition Re-Issue Vol. 16, para. 955 the learned authors state as follows:

"Where a person has by words or conduct made to another a clear and unequivocal representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon, or has so conducted himself that another would, as a reasonable person, understand that a certain representation of fact was intended to be acted upon, and the other person has acted upon such representation and thereby altered his position to his prejudice, an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be."

The doctrine of election consists in a choice between rights that the person making the election knows he possesses and which are alternative and inconsistent rights. Because they are inconsistent neither one may be enjoyed without the extinction of the other and that extinction confers upon the elector the benefit of enjoying the other, a benefit denied to him so long as both remained in existence. See *Sargent v A.S.L Developments Limited* (1974) 131 CLR 634 at

page 641. In *Evans v Bartlam* [1937] 2 All E.R 646 Lord Russell of Killowen said:

“The doctrine of election applies only to a man who elects with full knowledge of the facts”.

Approbation and reprobation is a doctrine which precludes a person who has exercised a right from exercising another right which is alternative to and inconsistent with the right he exercised. Lord Russell of Killowen in *Evans* (supra) puts it this way:

“The doctrine of approbation and reprobation requires for its foundation inconsistency of conduct, as where a man, having accepted a benefit given him by a judgment, cannot allege the invalidity of the judgment which conferred the benefit”.

The doctrine of waiver has been described by Brennan J in *The Commonwealth v Verwayen* (1990) 170 C.L.R 394 and page 421 as:

“a unilateral release or abandonment of a right”

In *Banning v Wright* [1972] 2 All E.R 987 Lord Hailsham in describing this doctrine said at page 998:

“In my view, the primary meaning of the word ‘waiver’ in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted”.

The issue to be determined

The issue that must be determined in the instant appeal is, whether the respondent, having elected to take retirement benefits despite the fact that he was informed that the post of Director Corporate Planning was not gazetted and

that there was no approved budgetary provisions in place for that post, can properly complain that he was wrongfully dismissed from his employment.

It is quite obvious from the evidence presented at trial that the respondent's previous post of Director Commercial Operations, was filled by another employee immediately after he was re-assigned on the 4th September 1989. I hold therefore that he could not, in law, have been wrongfully dismissed from that post by the letter of May 28, 1990.

It is further my view that the respondent's actions and conduct did in fact induce the appellant on the faith of his representations to forward to the respondent financial benefits that he would not have otherwise been able to obtain before retirement had he not proceeded on his early retirement. Further, as a result of the respondent's representations, the appellant had proceeded to pay him a monthly pension. I therefore hold the view, that the respondent is estopped from contending that the appellant had wrongfully terminated his employment. He would have equally waived his right to challenge his retirement as being one of wrongful dismissal. In the circumstances, the doctrine of estoppel would apply and he would be precluded from claiming damages for any alleged wrongful dismissal. The learned trial judge was therefore in error when he found that the respondent's retirement was unlawful and that it was done in disregard of the contractual arrangements between the parties.

Ground 4

The issue to be decided in this ground is whether the learned trial judge was in error when he found that the appellant's actions are not protected

pursuant to section 2(1) of the Public Authorities Protection Act. Section 2(1)(a) states:

"(1) Where any action, prosecution, or other proceeding, is commenced against any person for any act done in pursuance, or execution, or intended execution, of any law or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such law, duty, or authority, the following provisions shall have effect –

- (a) the action, prosecution, or proceeding, shall not lie or be instituted unless it is commenced within one year next after the act, neglect or default complained of, or, in the case of a continuance or injury or damage, within one year next after the ceasing thereof."

In the instant appeal, the respondent's cause of action for wrongful dismissal accrued on the 28th May 1990. He did not file action until the 9th March 1992. This period was in excess of one year and the appellant being a public authority was entitled to claim the protection under section 2(1)(a) of the Public Authorities Protection Act. In the circumstances the respondent's action would be statute barred.

Ground 5

The learned trial judge in adjudging that the respondent was entitled to

~~JUDGMENT STATED INTER ALIA:~~

"The plaintiff is entitled to damages in a sum equivalent to the salary he would have earned for the period from the 30th October, 1990 to 31st December, 1993. This sum to include all allowances that he was in receipt of up to his law retirement..."

The learned trial judge failed to compute the damages in terms of a specific sum so there was complaint that the judgment was "imprecise, vague, uncertain and incapable of enforcement".

The authorities have made it abundantly clear that the starting point in a cause of action for wrongful dismissal is assessing what the respondent has lost by reason of the appellant's breach of contract in wrongfully dismissing him: See ***Lavarack v Woods of Colchester Ltd*** [1967] 1 QB 278.

The learned author of McGregor on Damages 16th Edition has also stated inter alia at paragraph 1:

"Damages are the pecuniary compensation obtainable by success in an action, for a wrong which is either a tort or a breach of contract, the compensation being in the form of a lump sum awarded at one time, unconditionally and generally ..."

At paragraph 2069 he states further:

"The judge assesses the damages when sitting alone...."
The award must be in the form of a lump sum for which judgment is entered. No other form of final award is allowed to the court..."

I see no valid reason why this court should differ from the authorities referred to above. There is merit in this ground of appeal and it also succeeds.

Conclusion

For these reasons, I would allow the appeal and dismiss the respondent's notice. I further order that the appellant is entitled to costs both in this court and in the court below to be taxed if not agreed.

FORTE, P.

I agree.

SMITH, J.A.

I agree.