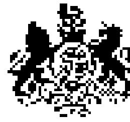
[2010] SC (Bda) 24 Civ (26 May 2010)



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2010: No. 142

BETWEEN:

BUSSIE IBLE	**1st Plaintiff**
IVAN BROADBELT	**2nd Plaintiff**
DEVINA BUTTERFIELD	**3rd Plaintiff**
KAREN SMITH	**4th Plaintiff**
EMILYGAIL DILL	**5th Plaintiff**

-v-

CEDARBRIDGE ACADEMY	**Defendant**

RULING

(Defendant's application to discharge interim injunction)

Date of Hearing: May 19, 2010

Date of Ruling: May 26, 2010

Mr. Michael Smith, Smith & Co, for the Applicant/Defendant

Ms. Venous Memari, Christopher E. Swan & Co, for the Respondents/Plaintiffs

Introductory

1. On the morning of Monday, May 3, 2010, I granted an ex parte interim injunction ordering in salient part that:

    1) the Defendant whether by itself its servants or agents or otherwise howsoever be restrained from advertising the positions held by the Plaintiffs at the Defendant school;

    2) the Defendant whether by itself its servants and/or agents or otherwise howsoever be restrained from terminating the Plaintiffs' employment until the final determination of these proceedings.

2. This Order was served on the Defendant's Principal at 2.40pm the same afternoon. With impressive efficiency, at 2.55pm the Principal emailed the Board of Governor's Secretary requesting her to notify the Board that legal papers had been served on her. The email named the Plaintiffs to this action and described the documents served including "An Order". The email was immediately forwarded by the Board's Secretary to all Board members; the actual documents were delivered to the Chairman's office at around 3.30pm, although not reviewed by him (according to his own evidence). At around 8.40 pm that same evening, the Defendant's Chief Operating Officer served a termination letter on the First Plaintiff which he had been given at a meeting at the School earlier that day at around 4.00pm.

3. The following day, May 4, 2010, the Plaintiffs, managers who have been employed by the defendant for between some 8 to 12 years, filed a Notice of Motion for contempt in relation to the First Plaintiff's termination in breach of the May 3, 2010 Order. The matter was heard on short notice and directions were given for the filing of evidence. On May 7, 2010, the Defendant's attorneys wrote the Court requesting that the matter of the Order and the contempt application be listed together. Counsel appeared in Court in respect of both the application to set aside and the contempt motion on May 13, 2010 when further directions were given.

4. At the May 13, 2010 directions hearing, I indicated that it was unlikely to entertain the application to set aside the injunction unless either (a) the contempt allegation was not proved, or (b) the contempt had been purged. I also expressed my concern about the need for oral evidence on matters which were not in dispute as the Defendant's affidavits appeared to clearly show a breach of the Order, with the state of mind of the Defendants agents the only issue.

5. After hearing oral evidence on March 19, 2010 in relation to the contempt issue and hearing submissions from Ms. Memari, it seemed obvious that:

   (a) the Order had been breached in circumstances where the Defendant had actual or constructive notice of its terms; and

   (b) the issue of whether the breach of the Order was deliberate or not was, as a matter of law, irrelevant to the question of whether a civil contempt had occurred.

Prior to the luncheon adjournment I indicated my provisional views to Mr. Smith and when the hearing resumed in the afternoon he indicated that the termination of the First Plaintiff's employment had been rescinded, effectively purging the contempt complained of. In these circumstances I saw no need to make any formal finding of contempt but awarded the costs of the contempt application to the Plaintiffs on a full indemnity basis.

6. The application to discharge the Order, which was not made by Summons in light of the liberty to apply granted by the Order itself, proceeded against this background. At the end of hearing argument, I reserved judgment on the application to set aside the entire Order. However, Mr. Smith convinced me that the restriction on termination *simpliciter* potentially gave the Plaintiffs *carte blanche*, pending the determination of the proceedings, to behave as they wanted without any disciplinary sanction. Accordingly, on May 19, 2010 at the end of the hearing I varied paragraph the Order to read as follows: "*the Defendant whether by itself its servants and/or agents or otherwise howsoever be restrained from terminating the Plaintiffs' employment until the final determination of these*

proceedings, save for cause". In other words, if the Plaintiffs committed any acts of gross misconduct after the Order was varied on May 19, 2010, the Defendant would not be restrained from lawfully terminating their employment.

7. An amended version of the Order has not yet been submitted for my signature, perhaps because counsel was awaiting receipt of the present judgment.

The ex parte application

8. Ms. Memari applied for the Order not simply ex parte, but without notice. At the beginning of the hearing I asked her to satisfy me that this was an appropriate case for not giving notice. By way of response she indicated that her clients feared that the Defendant might expedite a threatened decision to advertise their posts (and by implication to terminate their employment) based in part on the Defendant's non-response to counsel's correspondence exhibited at pages 74,76 and 78 of "Exhibit DKB1" to the Affidavit of Devina K. Butterfield sworn in support of the ex parte application. The exhibited correspondence revealed that by way of indirect and partial response to the Plaintiffs' attorneys' letters, the Defendant had indicated to the Plaintiffs that the controversial draft contracts had been withdrawn. It was submitted that advertising the Plaintiffs' posts would be the equivalent to a decision that their employment should ultimately be terminated.

9. The Court was referred to two sample contracts which suggested that the Plaintiffs were employed on an unlimited term basis. It was submitted there were no performance complaints against the Plaintiffs who had been employed for a number of years (8-10) at the School. It was believed that they were public officers, although this contention was admitted to be subject to some doubt. The Court was being asked to preserve the status quo while negotiations about the Plaintiffs' contractual terms and conditions continued, and while the Plaintiffs sought to establish certain legal propositions which would impact on the way in which any termination rights were exercised by the Defendant.

10. The Plaintiffs' Generally Indorsed Writ of Summons sought, *inter alia*, the following substantive declaratory relief in addition to interim injunctive relief:

1) a declaration that the Plaintiffs' contracts cannot be unilaterally varied or terminated in the present circumstances;

2) a declaration that the Plaintiffs' contracts must conform to the Employment Act 2000;

3) a declaration that the Defendant may not threaten to terminate or terminate the Plaintiffs' employment because of their failure to sign the proposed fresh contracts;

4) a declaration that the Board of Governors has no power to employ or to dismiss the Plaintiffs.

11. The Third Plaintiff's Affidavit in support of the ex parte application described the background to the application as follows. In January 2010, the Chief Operations Officer advised the managers that the Board wished to review their terms and conditions of service. They were given draft contracts the contents of which they referred to Mr. Ed Ball of the BPSU, who opined that they did not comply with the Employment Act. When they declined to sign the draft contracts, the Plaintiffs each received an April 16, 2010 letter warning that if they did not sign the draft contracts by 10.00am on April 29, 2010, their posts would be advertised. Mr. Ball was refused permission to be present to support the Plaintiffs at an April 20, 2010 meeting and the Plaintiffs' attorneys requested an extension of the April 29, 2010 deadline for signing the contracts by email dated April 28, 2010. After the Plaintiffs' attorneys by letter dated April 30, 2010 reiterated that the Defendant could not be threatened with dismissal for refusing to agree a modification of their contracts, on the same date the Board Chair wrote to the deponent advising that the offer of new contracts had been withdrawn.

12. With the Plaintiffs' attorneys still awaiting a direct response to their correspondence of April 28 and April 30, by email dated on May 2, 2010 the

attorneys demanded urgent confirmation that their clients' posts would not be advertised as stated in the Defendant's April 16, 2010 letter would happen if the Plaintiffs failed to sign the new contracts. In the absence of any response, the present application was filed on the morning of Monday May 3, 2010. At this juncture the Plaintiffs were employed on unlimited term contracts, had several years good standing and had been threatened with dismissal if they failed to sign contracts which were eventually withdrawn. The Writ action and the injunction application were both designed to preserve the integrity of inconclusive and somewhat volatile contractual negotiations, against the background of these written threats.

13. Although I was concerned about the propriety of granting an injunction in terms which would border on specifically enforcing a contract of employment, on balance the Plaintiffs' counsel satisfied me that the injunction sought was essential to preserve the integrity of the present proceedings and to prevent the Defendant taking action before trial which would make the present proceedings meaningless. Of course, no findings were made on what might well be contested evidence, the Court's only duty being to consider whether there was a good arguable case in support of the injunctive relief sought.

Application to set aside: principles applicable to interim injunctive relief

14. Mr. Smith for the Defendant argued that an interim injunction could only be granted in favour of the Plaintiffs under the principles established in *American Cyanamid-v-Ethicon* [1975] 1 All ER 505 if their claim included a prayer for a permanent injunction. I reject this submission. It is true that the Plaintiffs must show (a) a serious issue to be tried on their substantive claim, (b) that the breach of their legal rights they seek to restrain the Defendant from committing could not be adequately compensated for in damages, and (c) that the balance of convenience lies in favour of granting an injunction. But interim injunctive relief may be granted irrespective of whether or not a permanent injunction is sought. Order 29 of the Rules of the Supreme Court provides as follows:

*"**29/1 Application for injunction***

(1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, ***whether or not a claim for the injunction was included in that party's writ,*** *originating summons, counterclaim or third party notice, as the case may be." [emphasis added]*

15. The Plaintiffs' counsel relied on the following passages from David Bean, '*Injunctions*', 5th edition, at page 43:

> "*The court will not usually restrain an employer from terminating an employee's contract, but will leave the employee to his remedy in damages...Two exceptions to the general rule have been developed. The first is where the employer retains confidence in the employee's integrity and ability: an injunction may then be granted if it is clear that it would be just to do so...The second, the scope of which is not yet clear, is where the plaintiff's contract requires a particular procedure to be followed as a precondition of dismissal, and that procedure has not been followed...*"

16. In *Powell-v-Brent London Borough Council* [1988] I.C.R. 176, upon which Ms. Memari also relied, the English Court of Appeal found in relation to a longstanding public sector employee's negotiations about a new post had broken down: (a) there was no rational ground for the employer to lack confidence in the employee; and (b) damages would not be an adequate remedy if the employer was not restrained from advertising the employee's post pending trial, because "*she would have lost the satisfaction of doing this more demanding and rewarding job*" (per Ralph Gibson LJ, Transcript, page 16). I accept these principles as a useful guide to deciding the present application.

Is there a serious issue to be tried?

17. The Defendant is a statutory corporation and it is well recognised that bodies corporate have no inherent powers but only those powers expressly or by necessary implication conferred by their constitution. The simplest claim asserted by the Plaintiffs' is that the Defendant's Board, which is purporting to exercise disciplinary control over the Plaintiffs, is invalidly constituted. It appears to be common ground that George Scott, Chairman of the Board, has served two consecutive three year terms (2004-2007 and 2007-2010) and is now serving his third consecutive term. Paragraph 2 of the Second Schedule to the Education Act 1996 provides:

> "*(3) A person may not be appointed as a member of a board of governors for more than two consecutive terms.*"

18. I note Mr. Smith's submission that this point is not so straightforward it could fairly be characterised as a "slam-dunk" case, but a good arguable case is enough. It is not seriously arguable that the Board is <u>not</u> responsible for hiring non-teaching staff in an aided school however, having regard to the provisions of section 19 of the Education Act 1996. This point assumes that the Plaintiffs are not public officers, which the material presently before the Court does not indicate them to be.

19. It is seriously arguable that the Plaintiffs are entitled to declarations that the Defendant is not (a) able to unilaterally vary their terms and conditions, and (b) not able to terminate their employment for refusing to sign the new contracts which were withdrawn. It may well be that the Board's patience has been tested because the Plaintiffs are perceived to have been engaging in unjustified informal industrial action. On the other hand, the evidence presently before the Court indicates that the Board made a written threat to terminate the Plaintiffs' employment if they did not accept what the Board was offering in terms of a new contractual dispensation. That the controversial draft contracts are no longer "on the table" is no answer to these claims.

20. The Plaintiffs' re-amended Writ seeks a "*declaration that the employers must apply the discipline provisions of section 26 or 27 of the Employment* Act 2000 before giving notice of termination". This claim is seriously arguable having regard to the terms of section 26 and 27 of the Employment Act 2000, as read with, inter alia, section 18 of the Act. The latter provision appears to provide that where an employee is not employed under a fixed term contract, termination may only be for cause. This claim raises a question of law of considerable public importance in a period of economic fragility where there is no guarantee that terminated employees will easily find fresh employment.

Balance of convenience

21. In my judgment the balance of convenience lies clearly in favour of continuing the injunction granted on May 3, 2010 by this Court. There is a real risk that unless restrained from doing so, the Defendant may seek to terminate the Plaintiffs' employment in a manner which this Court may find to have been unlawful, depriving the Plaintiffs of substantial relief from this Court. This conclusion takes into account that if the Board is found to have been improperly constituted, any termination might be a nullity. However, in the interim, the quality of the Plaintiffs' right of access to the Court under section 6(8) of the Constitution would have been materially impaired. The main inconvenience to the Defendant appears to me that the Board will not be allowed to solve the employment dispute by simply "firing" the problem and may actually have to engage in rational and balanced negotiations. This is what employers, especially public sector employers, are supposed to do as a necessary incident of their role as such. It is not an inconvenience which can be accommodated by a court in the present interim injunction context.

22. The Defendant appears not to be an employer who can be relied upon to exercise restraint and respect the legal niceties of the pre-trial period. The Defendant has implicitly acknowledged a civil contempt in not complying with the Order after it was first served on May 3, 2010. The contempt was not purged at the first opportunity but only at the eleventh hour. It has been reported in the Press since I

reserved judgment that further dismissals have taken place, before the Order of May 3, 2010 has been formally amended and this Judgment handed down, enabling the Defendant to make an informed judgment as to whether or not a further breach of the injunction might be involved. Even if these reports are wholly untrue (and they are obviously not evidence for the purposes of the present application), they demonstrate the volatility of the situation and the need for the Court's intervention to support the maintenance of the status quo until trial.

23. On the other hand, the Plaintiffs themselves (or their representatives) ought to exercise greater restraint than they have thus far in making numerous pronouncements about the ongoing dispute to the Press. All of this appears to have developed out of what ought to have been an orderly review of terms and conditions of service in relation to employees of longstanding whose job performance was seemingly not the subject of criticism.

24. There is no objective reason why the parties concerned cannot work together to negotiate common sense solutions to the contractual disputes, while the legal issues raised by the present proceedings are worked out (assuming they are not also amicably resolved). All concerned would do well to remember that the Defendant's main function is that of a school providing educational services, with the Plaintiffs' jobs merely intended to provide a supporting role. It cannot be in the public interest that an employment dispute involving managerial support task should be allowed to take centre stage, and distract the Board from what ought to be its main focus, for any longer than is strictly necessary. These observations are made not gratuitously, but because the Court has a general duty, reflected in part in Order 1A of the Rules of this Court (the Overriding Objective), to encourage the parties to cooperate with one another and settle all or parts of a case.

Conclusion

25. For the above reasons I refuse the application to set aside the May 3, 2010 injunction. The injunction shall be continued, with paragraph 2 modified as of May 19, 2010 as follows:

> "*the Defendant whether by itself its servants and/or agents or otherwise howsoever be restrained from terminating the Plaintiffs' employment until the final determination of these proceedings, save for cause*".

26. For the avoidance of doubt "cause" in paragraph 3 of the Order as amended was intended to mean serious misconduct which the Defendant considers any of the Plaintiffs to be have been guilty of since May 19, 2010 which would warrant their summary dismissal without notice in accordance with section 25. This is of course without prejudice to the relevant employee's rights to challenge the legality of such dismissal in any event. Counsel may wish to take this into account when drafting the amended wording of the May 3, 2010 Order.

27. Unless either party applies by letter to the Registrar to be heard as to costs within 21 days, the costs of the present application shall be awarded to the Plaintiffs to be taxed if not agreed on the standard basis.

Dated this 26th day of May, 2010

____

KAWALEY J