



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2009: No. 441

BETWEEN:

DEBBIE KAY MARTIN

Plaintiff

-v-

THE MINISTER OF LABOUR, HOME AFFAIRS AND HOUSING

Defendant

Dates of Hearing: 13 December 2010

Mr. Richard Horseman of Wakefield Quin for the Plaintiff

Ms. Noriette Cartwright-Parry of the Attorney General's Chambers for the Defendant

RULING

1. This is an application by the Defendant, Minister of Labour, Home Affairs and Housing (the Minister) for an Order to strike out the Plaintiff's Generally Endorsed Writ of Summons and Statement of Claim which seeks an Order for damages for breach of contract, on the ground that the

- (a) Plaintiff sued the wrong party as the Defendant and to continue with the action would be an abuse of the process of the Court (Order 18 Rule 19 (1))
- (b) The pleadings disclose no reasonable cause of action against the Crown as a matter of law.

BACKGROUND

2. The genesis of this application is to be found in the dismissal of the Plaintiff from her employment as a Customer Service Representative in the Immigrations Department on the ground that she committed “Acts of Gross Misconduct” by video-taping confidential files, various work stations and, various offices within the Department.
3. The Plaintiff was employed in the Immigrations Department in the Ministry of Labour, Home Affairs and Housing (the Ministry) from 1984 until September 2007 – 24 years — when the Plaintiff’s employment was terminated for alleged serious misconduct.
4. It was alleged that sometime in March 2006 the Plaintiff with a video camera intentionally videotaped unattended employees work stations and confidential files and various places in the Department of Immigration. Her employment was suspended from 13th March 2006 while the Head of Civil Service convened a hearing in accordance with the Conditions of Employment and Code of Conduct (CECC) to determine if the alleged offence was made out and if the Plaintiff was found guilty to determine the appropriate penalty. After investigation the Plaintiff’s action was found to constitute “Gross Misconduct” as described under the CECC and she was dismissed from the Civil Service effective 1st September 2007.

5. The Plaintiff exercised her right of appeal to the Public Service Commission which affirmed the Head of the Civil Service decision.
6. In December 2009 the Plaintiff filed her Statement of Claim against the Minister seeking an order for damages for breach of contract/wrongful dismissal and the value of her benefit.

SUBMISSIONS

7. In the present case, Mrs. Cartwright-Parry, Counsel for the Minister submits that the Plaintiff was informed of her right of appeal, and appealed the decision to the Public Service Commission which affirmed the decision. Pursuant to paragraph 28 [5] of the Public Service Commission Regulation the decision of the Commission shall be final and the Plaintiff has no recourse to the Court. Counsel for the Minister drew attention to the case of *Thomas v Attorney General* [1981] 32 WIR which referred to the House of Lords decision in *Smith v East Elloe Rural District Council* [1956] AC 736 which upheld a complete ouster of the Court's jurisdiction.
8. Further Counsel submits that the Plaintiff was not deprived of a fair hearing and therefore there was no breach of natural justice. The Head of Civil Service and the Public Service Commission have the jurisdiction to exercise disciplinary control over the Plaintiff. What they did "fell (fairly and squarely)" within their function and jurisdiction under the Conditions of Employment and Code of Conduct and the Public Service Commission Regulation therefore, the Plaintiff cannot now challenge the decision of the Head of Civil Service and the Public Service Commission in these Courts. The Court is prohibited from questioning the validity of the decision of the Public Service Commission in the

circumstances, the Plaintiff's Generally Endorsed Writ of Summons and Statement of Claim should be struck out as the claim discloses no reasonable cause of action.

9. Mr. Horseman, Counsel for the Plaintiff submits that the Minister's submission that the Plaintiff has no recourse to claim damages for breach of contract is extraordinary. The procedure carried out was an internal grievance procedure to see if the decision should be upheld. The decision is final insofar as internal process, only. If the Employment Act 2000, which binds the Crown, ousts the jurisdiction of the Court, it should say so in very specific expression.
10. Mr. Horseman also submits that the Plaintiff is seeking a private law remedy given to her under the Employment Act 2000. It cannot be said that a grievance procedure takes away her right to private law damages.
11. In reply, Mrs. Cartwright-Parry argues that the Minister had nothing to do with this matter it was the Civil Service Commission. There was the avenue of Judicial Review which could have been taken within six months of the decision.

Procedural issues

12. In dealing with this matter, I bear in mind that the Court's power to strike out a claim is a discretionary power: RSC White Book 1999 Vol.1, Note 18/19/27 It is only in plain and obvious cases that a Court will strike out a claim: Note 18/19/6. In my judgment this is not such a plain and obvious case.
13. In my opinion the procedure which was carried out by the Head of Civil Service and the Public Service Commission does not preclude the Court from dealing with this matter. I

agree with Counsel for the Plaintiff that that was an internal grievance procedure and once exhausted, the Plaintiff can apply to the Court for final determination. The decision in *Smith v East Elloe Rural District Council*, *supra*, was decided on the particular facts of that case and the applicable statutory position. In that case, the commission was exercising a function vested in it by statute and by Section 102 (4) of the Constitution; the Court was prohibited from interfering.

GROUND S RELIED ON BY THE DEFENDANT

14. Mrs. Cartwright-Parry submits that because the Plaintiff allegedly sued the wrong party, continuance of the action would be an abuse of process. The rule connotes that the process of the report must be used *bona fide* and must not be abused. Nothing in the material placed before me suggests that the Plaintiff acted in contravention of the rule.
15. This is a contract of employment case and while it is rare not to know with whom a person contracted and should be suing for alleged breach of the terms of their contract, on the face of the matter the Plaintiff was an employee of the Department of Immigration and it seems clear that the head of that Department (the Minister) is ultimately responsible. If there is reasonable doubt as to the identity of the Head of Department, steps can be taken to join the Attorney General. If the Plaintiff has difficulty identifying the appropriate servant of the crown, the Minister can nominate the individual responsible for the damages or there is no reason why the Attorney General cannot do this.

16. Assume that it is correct that the Plaintiff has sued the wrong party the Court can give an opportunity to the Plaintiff to amend the claim to add the proper party and it can do so even if no formal amendment is put before it 18/19/2.

Pleadings disclose no reasonable cause of action.

17. A reasonable cause of action is a cause of action with chance of success if only the allegations in the claim are considered Note 18/19/10. No evidence is admissible under this head of application. RSCO 19 Rule 2 White Book Supra. In my view, the claim discloses some cause of action and raises questions fit to be determined by a Court. Under the constitution of Bermuda, every person is entitled to the fundamental rights and freedom of the individual including the protection of the law. Counsel, Mrs. Cartwright-Parry relied on the case of Thomas v Attorney General, Supra in support that in this case the Court's jurisdiction was ousted.
18. I bear in mind the general observations of Lord Diplock in Thomas at page 13 as to the effectiveness or otherwise of attempts to oust the Courts jurisdiction:

“The full doctrine laid down in Smith v Elloe Rural District Council [1956] AC 736) as to the effectiveness of ‘no certiorari’ clauses has since fallen into disfavour and has been whittled down considerably in England; particularly by the decision of the House of Lords in Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147 where one of the few remaining ‘no certiorari’ clauses was held to the insufficient to oust the jurisdiction of the High Court it is plainly for the commission to determine what, on the true construction of the Constitution, are the limits to the function of the commission.”

19. In my judgment this case does not bear the interpretation which Mrs. Cartwright- Parry puts upon it. It maybe in some particular cases and has happened in the Thomas’ case, a Court jurisdiction should be ousted. However that ouster was granted under the constitutional provision of the Trinidad and Tobago Constitution but this would be inconsistent with the Plaintiff’s constitutional rights, under the Bermuda Constitution. Our system of jurisprudence does not permit a person to be driven from the judgment seat in this way without a court considering their right to be heard, except in instances where the cause of action was obviously and incontestably bad.
20. This summary procedure of seeking to “strike out” the Writ and Statement of Claim by the Minister is one which is intended for use in plain and obvious cases when the action is one which cannot succeed or it is in some way an abuse of the process of the court. The case at bar is not so plain and obvious, so that the summary process of the courts should be invoked.
21. By Statute under Common Law, that the Courts have the jurisdiction to protect the rights of a person not to be unlawfully dismissed from employment. On considering the pleadings I am unable to say that the allegation is certain to fail. In the circumstances the application to strike out is refused.

Dated day of 2011

Justice Norma Wade-Miller