



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2012: No. 88

**IN THE MATTER OF THE PUBLIC SERVICE SUPERANNUATION ACT
1981**

BETWEEN:-

HIRAM EDWARDS

Plaintiff

-and-

THE MINISTER OF FINANCE

First Defendant

-and-

THE ATTORNEY GENERAL

Second Defendant

**RULING
(In Court)**

Date of hearing: 26th February 2015

Date of ruling: 6th March 2015

Mr Kenrick L James, James & Associates, for the Plaintiff

Ms Shakira J Dill, Attorney General's Chambers, for the First, Second and Third
Defendants

1. This matter came on before me on 26th February 2015 in somewhat unusual circumstances.
2. On 24th March 2014 the Court of Appeal granted the Plaintiff a declaration (“the Declaration”) that:

The first respondent unlawfully deducted payments from the appellant’s pension under Section 12 of the 1969 Act between May 2000 and May 2004 in a total sum to be agreed between the parties or in default of agreement to be determined by the trial judge.

3. The deductions were to recover the amount of pension overpaid to the Plaintiff while he was reemployed by the Government of Bermuda as a Temporary Assistant Telecommunications Inspector. Section 12 of the Public Treasury (Administration and Payments) Act 1969 (“the 1969 Act”) gave lawful authority for the deductions to be made. But they were made unlawfully because the Plaintiff was not given an opportunity to make representations whether, and if so, at what rate, they should have been made.
4. The Court of Appeal remitted the matter back to this Court to assess the amount payable under the Declaration. I was the judge at first instance and the matter came back before me on 29th August 2014. I assessed the total amount owing to the Plaintiff as \$457,722.84, of which \$114,192.17, plus 33 days interest at a daily rate of \$21.90 per day, represented the unlawfully deducted payments. The figures, which were calculated by the Plaintiff, were by consent. The balance was made up of other categories of loss which had been awarded to the Plaintiff at first instance.
5. Meanwhile, on 9th and 28th May 2014 the Accountant General wrote to the Plaintiff to inform him that he was considering withholding the pension payment which had previously been withheld unlawfully, which the Accountant General calculated as amounting to \$154,525.37, and in order to give the Plaintiff an opportunity to make representations whether there was any reason why the overpaid funds should not be recouped. In other words,

the Accountant General now sought to do lawfully what he had previously done unlawfully.

6. I was informed of the Accountant General's position at the hearing on 29th August 2014. The Plaintiff through his counsel submitted that, by reason of the Court of Appeal's said decision, the course of action proposed by the Accountant General was unlawful. I took the view that I was not seised of the issue, as the matter had been listed before me purely for the assessment of the amount payable under the Declaration, and I therefore made no ruling upon it.
7. However I invited the First Defendant to give the Plaintiff a further 14 days to make representations to the Accountant General. This was on the basis that the Plaintiff's response would be without prejudice to his primary contention that the Accountant General could not lawfully recoup the overpaid pension.
8. The Plaintiff did not avail himself of the opportunity to make representations to the Accountant General. This was despite a chasing letter from the Second Defendant's Chambers dated 16th September 2014. He took the view that there was no need because the course of action being taken by the Accountant General was unlawful.
9. On 30th September 2014 the Accountant General wrote to the Plaintiff stating that in the circumstances:

I therefore write to advise you that I have decided to exercise my discretion and withhold the sum of \$154,525.37 from the \$457,722 plus interest which is due to you from public funds, pursuant to section 12 of the *Public Treasury (Administration and Payments) Act 1969*. You have not provided any representations as to why I should not exercise my discretion in relation to the overpayment. Neither have you shown how such withholding would affect you in any way, nor that you relied on the overpayment to your detriment.

10. The Plaintiff responded the same day by issuing a notice of motion seeking an order that: the First Defendant and counsel for the Second Defendant be

held in contempt of court for allegedly failing to obey my order of 29th August 2014; the First Defendant pay to the Plaintiff forthwith the full amount assessed by the Court plus interest; and damages to be assessed as a penalty for the alleged non-compliance with the 29th August 2014 order.

11. Meanwhile the Accountant General issued a purchase order dated 3rd October 2010 to the Plaintiff's attorneys in the sum of \$305,524.67.
12. The committal application came before me on 5th November 2014. I dismissed it on the ground that there was no arguable case of contempt with respect to the order of 29th August 2014 as the order merely quantified the amount payable pursuant to the Declaration. I further ruled that the Court had no jurisdiction to determine whether there had been any contempt of court regarding the Declaration as the interpretation of its ambit was properly a matter for the Court of Appeal.
13. I have since been referred by Mr James to Order 2 rules 29 and 30 of the Rules of the Court of Appeal of Bermuda.
14. Rule 29 provides:

"Any judgment given by the Court of Appeal may be enforced by the Supreme Court or by any other Court which has been seized of the matter, as the Court may direct."
15. Rule 30 provides:

"When the Court directs any judgment to be enforced by another Court, a certificate ... under the seal of the Court and the hand of the presiding judge setting forth the judgment shall be transmitted by the Registrar to such other Court, and the latter shall enforce such judgment in terms of the certificate."
16. In light of those rules I accept that in principle this Court can enforce a judgment of the Court of Appeal if directed to do so by that Court. In order to do that, this Court may have to interpret the judgment. But a declaratory judgment merely states the legal position regarding a matter in dispute. See

Zuckerman on Civil Procedure, Second Edition¹, para 22.19. It is not generally capable of enforcement.

17. In particular, an order for committal will not lie with respect to a declaration. See the judgment of the court, handed down by Judge LJ (as he then was) in St George's Health Care NHS Trust v S [1999] Fam 26 EWCA:

“Non-compliance with a declaration cannot be punished as a contempt of court, nor can a declaration be enforced by any normal form of execution, although exceptionally a writ of sequestration might be appropriate: see Webster v. Southwark London Borough Council [1983] Q.B. 698 . Apart from that rare exception it operates solely by creating an estoppel per rem judicatam between the parties and their privies: In re F. (Mental Patient: Sterilisation) [1990] 2 A.C. 1 , 64.”

18. The real issue between the parties is whether the Declaration prohibits the Accountant General from any subsequent exercise of his discretion as to whether to withhold the monies that were previously withheld unlawfully from the Plaintiff. With this in mind, I suggested at the hearing on 25th November 2014 that the parties might wish to seek clarification from the Court of Appeal as to the intended effect of the Declaration. It is always open to a party to go back before a court that has made an order or declaration for the purpose of obtaining clarification as to how the order or declaration was intended to operate.
19. Both parties wrote to the Court of Appeal, c/o the Registrar, seeking clarification on this point. The Registrar replied on 5th and 17th December 2014. She addressed the terms of the Declaration, but did not expressly address the validity of any subsequent exercise by the Accountant General of his discretion.
20. On 2nd December 2014 the Plaintiff filed a notice of application for an order for enforcement of judgment pursuant to Order 2, Rule 29 of the Court of Appeal Rules. There was administrative confusion as to whether the notice was intended to be filed in this Court or alternatively the Court of Appeal.

¹ There is now a Third Edition, but the nature of declaratory judgments has not changed since the Second Edition was published.

21. Meanwhile, Ms Dill prepared a typed extract of an exchange between her and Zacca P at the hearing before the Court of Appeal. The extract was prepared from the official CourtSmart record of the hearing.

“12:05:59 – (Justice Zacca) ASSUMING FOR A MOMENT THAT DELAY DOES NOT AFFECT THE ISSUE, IN OTHER WORDS, IT’S AN UNLAWFUL ACT

12:06:07 – (Justice Zacca) THE STATUTE OF LIMITATION DOES NOT APPLY TO THE CROWN DOES IT? DOES IT?

12:06:08 – (S. Dill) TO RECOUP THOSE FUNDS, OUTSTANDING PAYMENT – WE CAN STILL TRY AND RECOUP THOSE FUNDS. THE ONLY REASON WHY IT STOPPED IS BECAUSE THE ACG DEPT REALISED ...

12:06:26 – (Justice Zacca) NO WHAT I MEANT WAS

12:06:07 – (Justice Zacca) ASSUMING FOR A MOMENT ITS AN UNLAWFUL ACT, AND THE DECLARATION IS MADE IT IS AN UNLAWFUL ACT THE JUDGE MADE DECLARATION, YOU WOULD STILL BE ABLE NOW IF YOU HAD TO MAKE A DECISION AND TO USE DISCRETION TO RECOVER MONEY AND AS TO HOW IT SHOULD BE PAID, YOU COULD STILL DO THAT COULDN’T YOU?

12:06:53 – (S. Dill) YES ...”

22. Ms Dill relies upon this passage as showing that the position taken by the Accountant General is consistent with the position taken by Zacca P during oral argument. Of course remarks made by judges in the course of oral argument by counsel are not rulings and may not reflect a judge’s final or even provisional view on a matter.
23. Due to the administrative confusion concerning the 2nd December 2014 notice of application, the matter was listed before me in this Court on 26th February 2015. As the notice of application was marked as filed in the Court of Appeal, and Mr James confirmed that that was indeed its intended destination, I self-evidently had no jurisdiction to deal with it.
24. However, given the somewhat convoluted history of the enforcement proceedings I indicated that I would be prepared to set out in writing the

history of those proceedings as this might assist any court called upon to deal with the matter in future.

25. I have therefore treated the hearing as a mention in 2012: No 88 in this Court upon a renewed application by the Plaintiff for assistance in enforcing the judgment of the Court of Appeal.
26. In light of Order 29 rule 2 of the Rules of the Court of Appeal I am satisfied that I have jurisdiction to enforce the Declaration, insofar as it is capable of enforcement. However it is not clear to me that the Declaration does prohibit the Accountant General from withholding \$154,525.37 pursuant to a further exercise of his discretion. I am therefore unable to assist the Plaintiff. The Court of Appeal is the court best qualified to pronounce upon whether that was the Declaration's intended effect. The Plaintiff's notice of application will be listed before them in due course.
27. I make no order as to costs.

Dated this 6th day of March, 2015

Hellman J