[2017] JMCA App 40

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 54/2015

APPLICATION NOS 124 & 161/2017

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA

BETWEEN	**THE ATTORNEY GENERAL**	**APPLICANT**
AND	**BARRINGTON IRWIN**	**RESPONDENT**

Barrington Irwin in person

Miss Sheniel Hunter instructed by the Director of State Proceedings for the applicant/respondent

12 October 2017

MORRISON P

[1] There are two applications before the court. The first is an application filed by the Attorney General (No 128/2017), to whom we will refer as the applicant, to strike out a notice of appeal filed by Mr Irwin, to whom we will refer as the respondent, on 7 May 2015.

[2] The grounds of this application are that (i) section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act ('the Act') stipulates that leave is required to appeal against an interlocutory judgment or order; (ii) the order from which the respondent now seeks

to appeal is interlocutory in substance; and (iii) no leave has been granted. The applicant accordingly contends that the appeal is not properly before the court.

[3] The second application is the respondent's application (No 161/2017), filed on 31 August 2017, to strike out the applicant's application to strike out the notice of appeal. The respondent contends that the applicant's application to strike out his appeal should itself be struck out.

[4] In respect of both applications, we heard submissions this morning from Miss Hunter for the applicant and from Mr Irwin in person.

[5] In order to understand how these applications arise, it is necessary to state something of the history of the matter. The respondent was once employed at the Bellevue Hospital, an institution which falls under the purview of the Ministry of Health, which explains the involvement of the Attorney General in the matter. Although the respondent accepts that he tendered a letter of resignation dated 23 February 1999 to the Bellevue Hospital, he now maintains that, by a subsequent letter dated 25 February 1999, he withdrew his resignation.

[6] The respondent filed actions against the applicant. By an amended claim form filed on 13 December 2011 (Claim No 01309/2010), the respondent sued for a number of remedies and reliefs against the applicant, for "illegal dismissal, negligence, outstanding monies, assault on the job, civil service pension and pension benefits in regard to former employment and medical board from 2004". The second action was filed by the respondent on 13 December 2011 (Claim No 05168/2010), claiming various

remedies against the applicant, including outstanding pension benefits, arrears of pay and invalidity pension under the National Insurance Act 1965. So, in general terms, it appears that the first action related to the alleged unlawful dismissal of the respondent, while the second related to what were said to be his outstanding pension benefits.

[7] By an acknowledgment of service filed on 30 January 2012, the applicant acknowledged service of the claim forms in respect of both actions and, on 19 July 2012, the applicant applied in the Supreme Court for orders striking out both actions. By this time, although it is not clear on what basis, the two actions were being referred to as consolidated actions, and the application to strike out was made on grounds which were formulated as follows:-

1. That it was an abuse of the court's process.

2. For failure to comply with part 8 of the Civil Procedure Rules 2002 (CPR).

3. For disclosing no reasonable ground for bringing the claim or prospect of success;

4. For being statute-barred.

[8] The applicant also sought other reliefs which are not presently relevant. In answer to a question from the court, Miss Hunter told us that the breaches of the CPR to which reference was made were that no particulars of claim were filed in relation to either of these actions.

[9] Thereafter, on 5 September 2012, the respondent filed an application of his own, in which he sought an order striking out the applicant's application to strike out his actions. So the application filed by respondent in this court in fact mirrors the one he filed in the court below. The grounds of his application in the court below were, among others, that the applicant's application was illegal and unconstitutional and that there had been breaches of the CPR.

[10] The respondent filed particulars of claim in the Supreme Court actions on 27 December 2012, although it is not entirely clear by what authority they were filed on that date, several months having by then elapsed. But nothing now turns on that. The strike-out applications were heard by Cole-Smith J on 29 October 2014. The formal order filed on that application records that the learned judge refused the respondent's application for court orders and granted the applicant's application for court orders in the following terms:-

1. Claimant's claim is an abuse of the process of the court;

2. It discloses no reasonable grounds for bringing the claim;

3. It is statute barred.

[11] Cole-Smith J made no order as to costs.

[12] On 13 February 2015, just a few months after Cole-Smith J's order, the respondent filed a further application in the Supreme Court seeking various declarations in the actions which he had filed. Included among those declarations were orders that

the applicant should pay to the respondent the monies that he claimed to be owed to him. This application came on for hearing before McDonald J on 15 April 2015. On that date, as appears from the formal order filed on 31 December 2015, McDonald J ruled that, in light of Cole-Smith J's order made on 29 October 2014, the court had no jurisdiction to hear the further application.

[13] It is against this background that, on 7 May 2015, the respondent filed the notice of appeal in this court. The purported appeal was against the orders made by Cole-Smith J on 29 October 2014. The notice of appeal also made a number of other complaints, which is not now necessary to rehearse. And this, in turn, is what has led now to the strike-out application which is now before us.

[12] Miss Hunter makes a number of points. She submits that the order which was made by Cole-Smith J was an interlocutory order and that, under section 11(1)(f) of the Act, no appeal will lie from an interlocutory order save with the leave of the court below or this court. She points out that no application for leave has been made or granted either in the court below or in this court and that in these circumstances the appeal filed by the respondent is a nullity and should be struck out.

[13] Miss Hunter very helpfully provides us with the authorities decided by this court which establish, firstly, that, applying what has now come to be known as the application approach, an application to strike out is an interlocutory order; and secondly that, if an appeal is filed without leave having been granted, it is liable to be struck out

in these circumstances (see, for instance, **Vincent Gaynair et al v Negril Beach Club et al** [2012] JMCA Civ 25).

[14] The respondent, on the other hand, makes a number of submissions, seeking to clarify certain matters. Referring to a previous occasion on which the matter came before a differently constituted panel of the court (Brooks, McDonald-Bishop and P Williams JJA), the respondent submits that there are directions which the court made on that occasion requiring the applicant to organise the core bundle in chronological order which have not been complied with. He submits that documents which the applicant was ordered to serve on him at a case management conference have not been served on him. He also submits, perhaps more substantively, that the application to strike out his action in court below was unlawfully and unconstitutionally dealt with by Cole-Smith J. The basis of this submission is that notice of the application was originally issued for hearing on a particular date in 2012, while it was not in fact heard until 2014. He makes the same point about his own notice of application to strike out the applicant's strike-out application, which he says should have been dealt with in 2013, but was not heard by Cole-Smith J until October 2014. He also submits that both applications should not have been heard at the same time as they were filed and intended to be heard separately, and that Cole-Smith J had therefore erred in hearing them together.

[15] The respondent makes a number of other submissions in answer to some exchanges with the court, seeming to suggest that leave to appeal was in fact granted by either Cole-Smith J or McDonald J. He also submits that in any event he has a

constitutional right to come before the court and that he had reasonable grounds for bringing these claim in the court below.

[16] Based on all the material we have seen and the submissions on both sides, it appears to us that the position is as follows. Firstly, Cole-Smith J's order was plainly interlocutory, given this court's commitment to the application approach in this regard. The question to be asked is therefore whether the order made on the application will bring finality to the action, whichever way it is decided. If, on one outcome, the application will not bring finality, then the order made on it is in fact interlocutory for this purpose. Secondly, we are satisfied that section 11(1)(f) of the Act clearly and without equivocation provides that leave to appeal is required, either from the court below or from this court, in respect of a proposed appeal from an interlocutory order of the sort made by Cole-Smith J in this case. And thirdly, having carefully examined the records of the court below filed in this court, as well as the documents produced by the respondent himself, we are satisfied that no application for leave to appeal was either made to or granted by court below.

[17] It therefore follows that the notice of appeal filed on 7 May 2015 was filed without leave having been obtained as required by the Act and is therefore a nullity and of no effect. **Leymon Strachan v The Gleaner Company Ltd** ((unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 54/1997, judgment delivered 18 December 1998), to which Miss Hunter referred us, is a clear example of a case in which this was the inevitable result of an appeal filed without the requisite leave having been obtained. In the result, in this case, we consider that the respondent's application

to strike out the applicant’s strike-out application must fail; and the applicant's strike-out application must succeed.

[18] The ordinary rule of the court is that costs follow the event. Applying the ordinary rule, it would appear that the applicant, who has now succeeded on both on her application and on the respondent's application, ought to be entitled to costs in respect of both applications. However, taking into account the long and tortuous course that the litigation has taken, and also taking into account the fact that, for some reason which is not entirely clear, it took the applicant over two years to decide to make this application, we will make no order as to costs on both applications.