[2015] JMCA App 22

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 1/2015

APPLICATION NO 10/2015

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (AG)

BETWEEN	**ALEXANDER OKUONGHAE**	**APPLICANT**
AND	**UNIVERSITY OF TECHNOLOGY, JAMAICA**	**RESPONDENT**

Applicant in person

Gavin Goffe and Jermaine Case instructed by Myers Fletcher and Gordon for the respondent

16 April and 29 May, 2015

PANTON P

[1] I have read in draft the judgment of my learned sister Phillips JA. I agree with her reasoning and conclusion. There is nothing that I can usefully add.

PHILLIPS JA

[2] On 16 April 2015, the applicant appeared before us on a notice of application for permission to appeal inter alia, the judgment of McDonald-Bishop J, dated 19 September 2014, in which the claim was dismissed and judgment entered for the respondent. At the hearing of the notice of application for permission to appeal, counsel for the respondent, Mr Goffe, raised a preliminary issue which the court thought ought to have been determined before hearing the submissions of the applicant. Counsel for the respondent, submitted that the applicant had a right of appeal, since the judgment entered by McDonald-Bishop J, was a final judgment. Consequently no permission to appeal to the court was required. Instead, the proper application to have been made by the applicant was an application for an extension of time within which to file notice and grounds of appeal.

[3] The crucial issue before us therefore, is whether the proper application was before this court. We have to determine whether the judgment entered by McDonald-Bishop J, was interlocutory in nature or a final determination of the claim. The nature of the judgment will determine whether the applicant required permission to appeal and the applicable time period within which to file the appeal. Whether a judgment is interlocutory or final in nature will be determined by the 'application approach' which has been the settled approach in these courts for many years and utilized consistently. This judgment does not therefore address the merits of the appeal, as we have not yet heard any arguments on the substantive grounds of the appeal filed herein.

[4] Previously, on 8 January 2015, an application for permission to appeal and a stay of execution of the judgment of McDonald-Bishop J was refused by Frank Williams J, on the basis that the application was misconceived. Subsequently, the applicant, acting in person, filed on 12 January 2015 and 21 January 2015, notice of appeal and notice of application for permission to appeal, respectively.

[5] In the event that the judgment of McDonald-Bishop J was interlocutory, section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act (JAJA) requires that the applicant seek permission to appeal from either a Supreme Court judge or from the Court of Appeal. Further rule 1.8(1) of the Court of Appeal Rules (CAR) requires that the applicant apply for permission to appeal within 14 days of the date of the order against which permission to appeal is sought. The applicant would then be required to file his notice of appeal within 14 days of the date of permission having been granted. In this instance, as indicated above, the applicant sought permission below, which was refused by Williams J, thus the applicant would have been required to seek permission to appeal within 14 days of the date of that order. The applicant would have satisfied that requirement, having filed his notice of application for permission to appeal on 12 January 2015.

[6] On the other hand, if the judgment of McDonald-Bishop J was final, the applicant, in accordance with rule 1.11(1)(c) of the CAR, having a right of appeal, that is, where permission to appeal is not required, would have been required to file his notice of appeal within 42 days of the date the order of McDonald-Bishop J was served

on him. Thus, having not filed his notice of appeal until 12 January 2015, he would require an extension of time from the court in order to file the notice and grounds of appeal, or with that application, a further request that the notice and grounds of appeal already filed on 12 January 2015, stand as having been properly filed.

Background

[7] The decision of McDonald-Bishop J emanates from the applicant's claim form and particulars of claim, filed on 23 March 2010 in the Supreme Court. On 11 May 2010, the respondent filed a defence. On 20 April 2012, the applicant filed an amended claim form and amended particulars of claim adding an employee of the respondent 'Utech' as the '2nd defendant'. That notwithstanding, the applicant made an ex parte application to Batts J for the 2nd defendant to be added to the claim, which was granted. The order was however later set aside at an inter partes hearing by Mangatal J.

[8] Consequently, on 19 December 2012, the applicant filed a further amended claim form and particulars of claim, removing the 2nd defendant as a party to the suit/claim claimed the following:

> "1. Damages for wrongful, and/or **unlawful**, **and/or unjustified**, and/ or unfair dismissal;
>
> 2. Damages for breaches and/or failure to observe principles of fairness, reasonableness and natural justice arising from the discrimination, bias, unfair treatment and victimization of the Claimant by servants, agents and/or employees of the Defendant during the period 2001 to 2009;

3. Damages for breach of contract of employment by failing, refusing and/ or frustrating the process of evaluation of the Claimant by servants, agents and/or employees of the Defendant and thereby depriving the Claimant of consideration for promotion to the position of Technical Officer-Mechanical/Chemical in the faculty or to any other position despite his sterling performance and contrary to the ordinances and/or established policies and practices of the Defendant;

4. Damages for mental and emotional torment and suffering suffered by the Claimant resulting from the unfair and malicious conduct and actions of the servants, agents and/ or employees of the Defendant;

8. [sic] Damages for negligence, failure and/or refusal to ensure that efficiency and good order was maintained and/or steps taken as were necessary and/or reasonable to safeguard the interests of the Defendant in the circumstances where the Claimant had invoked the special appeals process to the President of the Defendant regarding financial aid and barring the Claimant from entering the Defendant's Campus, in his pursuit of the Master of Philosophy in Pharmaceutics course.

9. Damages for wrongfully, **unlawfully**, **unjustifiably** and unfairly de-registering the claimant from the Master of Philosophy in Pharmaceutics Programme.

10. Legal Costs paid to Aisha N.M. Mulendwe, Attorney-at-Law in the sum of **$108,000.00 and continuing**.

11. Damages for deprivation of health insurance and other benefits enjoyed by the Claimant;

12. Damages for libel arising from the Defendant's servant, agent and/or employee the 2nd Defendant Dr. Nilza Justiz-Smith publishing and circulating false damming [sic] statements contained in correspondence dated April 15, 2009 namely: "has a history of violence on this campus", causing the Claimant to be wrongly and unfairly punished by being suspended pending a hearing that was never convened, and causing other professionals in his faculty to distance themselves from him, making the communication

and working environment very untenable, uncomfortable and at times unproductivity [sic].

13. Damages for loss of earning and future earnings and/or alternative employment commensurate to the Claimant's qualifications and work experience, and/or resulting, mental anguish, pain and suffering;

14. Aggravated damages and/or exemplary damages;

15. Interest on general damages at the rate of 6% per annum;

16. Interest on the special damages at the rate of 29.99% per annum it being the rate charged by the Claimant's banker, the National Commercial Bank Jamaica Limited;

17. Costs."

[9] By written submissions, the applicant, through his then attorney-at-law indicated that the following remedies which were initially included in the further amended claim form and particulars of claim would no longer be pursued. They are:

1. "Damages for wrongful, and/or **unlawful**, **unjustified and/or dismissal**.

2. Damages for mental and emotional torment and suffering suffered by the claimant resulting from the unfair and malicious conduct and actions of the servants, agents and/or employees of the Defendant.

3. Legal Costs paid to Aisha N.M. Mulendwe, Attorney-at-Law in the sum of **$108,000.00 and continuing**.

4. Damages for deprivation of health insurance and other benefits enjoyed by the Claimant;"

[10] The matter was heard on 2, 3 and 4 October, 10 and 20 December 2013 and 19 September 2014, before McDonald-Bishop J. On the evidence at the trial, it was revealed that the applicant had been employed to the respondent as a Laboratory

Technologist in the faculty of Engineering and Computing for the period 13 August 2001 to 5 September 2009. The relationship was governed by a contract which expressly provided for termination of the contract of employment by either party, giving one month's notice in writing.

[11] On 4 August 2009, the respondent gave the applicant one month's written notice of the termination of the employment contract, to take effect on 5 September 2009. By the terms of the written notice, the applicant was not required to attend work for the period of the notice. Accordingly he was given salary in advance for the period 1 August 2009 to 4 September 2009, and payment in lieu of unused vacation leave. Further, an unsettled loan balance of $87,392.78 as at 31 July 2009 was settled from the outstanding leave which was due to the applicant valued at $199,903.44. The grounds for the termination of the applicant's contract of employment were that he had exhibited conduct which was unbecoming of an employee of the institution, namely that on two occasions he had made inciting and unsubstantiated allegations against the university and its officers. He also made false statements about officers of the University which could bring the name of the university into disrepute, and that he had shown gross insubordination.

[12] At the trial, the respondent contended that pursuant to section 5 of the University of Technology, Jamaica Act (UTJA), the Governor-General is the "Visitor" of the respondent. It is he who has exclusive jurisdiction in relation to any dispute relating to the internal rules and procedures of the respondent. Consequently, the court does

not have jurisdiction to hear any dispute concerning the respondent's policies, practices and ordinances.

[13] McDonald-Bishop J indicated that it was necessary to resolve the issue of jurisdiction, before examining the substance of the claim, as she stated that most of the damages which were being sought by the applicant related to the internal policies and procedures of the respondent.

[14] Section 5 of the UTJA provides that:

> "The Governor-General or the person for the time being performing the role and functions of the Governor-General shall be the Visitor of the University, who in the exercise of the visitorial authority, may, from time to time, and in such manner as he shall think fit-
>
> (a) direct an inspection of the University, its buildings, laboratories and general work, equipment and of the examination, teaching and other activities of the University by such person or persons as he may appoint in that behalf; and
>
> (b) hear matters referred to him by the Council."

Further, Article 11(2) of the Charter of the University, as set out in the first schedule to the UTJA, provides that;

> "The Council shall have general control over the conduct of the affairs of the University and shall have all other such functions as may be conferred upon it by the Statutes."

[15] Counsel for the respondent had contended that where the visitorial jurisdiction exists, a long line of authority supports the position that such a jurisdiction is exclusive,

and not concurrent with the court's jurisdiction. In support of this contention, counsel cited **Patel v University of Bradford Senate and Another** [1978] 3 All ER 841, 846, **R v Dunsheath, ex parte Meredith** [1950] 2 All ER 741, 743 and **Vanessa Mason v University of the West Indies** SCCA No 7/2009, delivered 2 July 2009.

Submissions

[16] The applicant's submissions in relation to the issue of the visitorial jurisdiction are summarized as follows:

1. The visitor is an old creature associated with 16th and 18th centuries charitable organizations and as such universities which are civil corporations did not fall under the visitor's jurisdiction (**R (on application of Varma) v HRH the Duke of Kent** [2004] EWHC 1705 (Admin)).
2. Section 3(2) of the UTJA states that the university is established as a body corporate and that the term body corporate should be accorded the same meaning as stated in section 28 of the Interpretation Act. Thus, since a body corporate can sue and be sued, the respondent having breached the terms of the employment contract, it should follow that the claim for damages was properly before the court.
3. Since the respondent had failed to file an acknowledgment of service to dispute the court's jurisdiction in accordance to rule 9.6(1) and 9.6(5) (b)

of the CPR, the respondent was deemed to have accepted the court's jurisdiction.

Having reviewed the submissions and authorities, McDonald-Bishop J found in favour of the respondent's jurisdictional challenge. She also found that the respondent had a visitor in the person of the Governor-General. Consequently, all the issues in the further amended claim form and particulars of claim which related to the internal rules and procedures of the respondent, fell within the purview of the Governor-General, and were to be decided by the visitor, albeit that the applicant had classified those issues as being a part of his contractual arrangement.

[17] On the other hand, the learned judge also found that the issues which did not relate to the internal policies and procedure of the respondent fell within the jurisdiction of the court. Thus, the jurisdiction of the court would co-exist with the visitorial jurisdiction of the Governor-General. Therefore, McDonald-Bishop J proceeded to consider the issues which, in her opinion, did not relate to the internal policies and procedures of the university, and therefore fell within the court's jurisdiction. Those findings are set out below.

Findings of McDonald-Bishop J

[18] On the claim for wrongful dismissal, McDonald-Bishop J found that it could not stand since the requisite contractual and statutory notice to which the applicant was entitled had been given (one month's notice). In addition, the applicant had been paid full salary for the notice period, for which he was not required to attend work. The

learned judge also accepted the submission of counsel for the respondent, that damages were not recoverable for breach of either an implied or express term of an employment contract, as to the manner of dismissal.

[19] McDonald-Bishop J stated at paragraph 34 of the judgment that:

> "…it is evident that the claimant's complaint is not that the notice period was unlawful as being in breach of statute, the common law or in breach of his contract. His compliant is, generally, that he was dismissed without a hearing and in breach of the defendant's own procedures and/or principles of natural justice and laws of Jamaica. The claimant has not pointed to the laws of Jamaica that have been breached and by what means. The gravamen of his complaint, clearly, is on the grounds of unfairness arising from alleged breaches of internal processes, policies and procedures."

Accordingly, the learned judge found that on the evidence before her, the issue of unfair dismissal did arise. Although the applicant had indicated in written submissions that he no longer intended to claim for unfair dismissal, the learned judge nonetheless dealt with the issue in this way. She stated that the issue of unfair dismissal was connected purely to the internal laws, policies and processes governing the respondent and its employees, and as such fell to be determined by the visitor. Additionally, McDonald-Bishop J held that the court was not the proper forum to determine the issue of unfair dismissal, as it fell within the remit of the Industrial Disputes Tribunal established by parliament, under the Labour Relations and Industrial Disputes Act.

[20] The learned judge found that the concept of natural justice, being generally applicable to the sphere of public law, had no application to private contractual

relationships. On this basis, the learned judge found that the claim for breach of natural justice could not be relied upon by an employee to challenge his dismissal.

[21] The learned judge at paragraph 65 of her judgment found that a claim alleging libel, fell within the jurisdiction of the court because adjudication on allegations of libel would be extraneous to the visitorial jurisdiction, although the internal procedures and policies of the respondent were central to that allegation. However, on the evidence, the learned judge found that the applicant had failed to plead and prove the respondent's liability for libel, in that, the statement being complained of as defamatory was attributed to an employee of the respondent whose name was ordered to be removed from the applicant's statement of case as the '2nd defendant', by order of Mangatal J on 23 November 2012. However, at the trial the employee's name still appeared in the pleadings and an amendment was sought to have it removed. Thus, the pleadings showed that the complaint concerned "an employee, servant or agent of the defendant" and not the respondent itself.

[22] In the view of the learned judge, the complaint of the alleged defamatory statement emanated from the employee, there being no allegation of libel against the respondent, in either the pleadings or the evidence. The employee having reported threats which she, the employee, had said that the applicant had made to her, the respondent in those circumstances would have played no part in the dispute, except to receive the complaints. Furthermore, the court held that the submission of the

applicant's counsel that the respondent was liable for excessive publication could not stand, since the allegation had not been pleaded or particularized.

[23] The learned judge also found that there was no legal or factual basis on which an award for loss of earnings and future earnings and/or loss of alternative employment commensurate with the applicant's qualification, could be made.

[24] Additionally, the learned judge held that the applicant had failed to comply with the fundamental rules which require that the applicant state the grounds upon which a claim for aggravated and exemplary damages was being made, and she stated further that the applicant had failed to particularize in the pleadings the full details of the facts being relied upon, in support of such a claim for damages. The applicant therefore, had failed to prove any primary liability in the respondent that would justify any award of damages.

[25] Ultimately, McDonald-Bishop J concluded that there was no basis in fact and in law on which any damages, interest or costs claimed by the applicant could properly be awarded by the court and held that "[t]he claim is, therefore, dismissed in its entirety". Judgment was entered for the respondent with costs to be taxed if not agreed. It was pellucid that the learned trial judge had dealt with all the matters in controversy that had been raised as issues between the parties on their respective pleadings.

The law

[26] Section 11(1)(f) of the JAJA provides that:

"No appeal shall lie-

(f) without the leave of the Judge or of the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a Judge except…"

There are six exceptions stated in the section but none of these is applicable in the instant case.

Rule 1.8 of the CAR sets out how an applicant may obtain permission to appeal from an interlocutory order or judgment. It reads:

"(1) Where an appeal may be made only with the permission of the court below or the court, a party wishing to appeal must apply for permission within 14 days of the order against which permission to appeal is sought."

Rule 1.11 of the CAR sets out the time for appealing to the Court of Appeal. It provides as follows:

"(1) The notice of appeal must be filed at the registry and served in accordance with rule 1.15-

(a) in the case of a procedural appeal, within 7 days of the date the decision appealed against was made;

(b) where permission is required, within 14 days of the date when such permission was granted; or

(c) in the case of any other appeal within 42 days of the date when the order or judgment appealed against was served on the appellant.

(2) The court below may extend the times set out in paragraph (1)."

Analysis

[27] Section 11(1)(f) of the JAJA clearly provides that an appeal from an interlocutory judgment or order cannot be brought without first obtaining the permission of the Supreme Court judge or the Court of Appeal except in certain circumstances. Pursuant to rule 1.8 of CAR , this permission must be applied for first in the court below and then in this court within 14 days of the order against which permission to appeal is sought. The time frames for the filing of appeals from interlocutory and final orders are captured in rule 1.11 of the CAR. Interlocutory orders require permission to appeal, and once permission is obtained, the notice of appeal should be filed within 14 days of the order. Where the order or judgment being appealed is final, then such notice of appeal should be filed within 42 days of the date when such an order or judgment appeal against was served - **Monica Harris v Lawson & Others et al** [2010] JMCA App 20.

[28] Brooks JA in **John Ledgister and Others v Bank of Nova Scotia Jamaica Limited** [2014] JMCA App 1 stated that "the court has accepted that, what is known as the 'application test', is the appropriate test for determining what constitutes a final decision in civil proceedings". He further quoted from the decision of Lord Esher MR, in **Salaman v Warner and Others** [1891] 1 QB 734 when proffering an explanation of the 'application test':

> "The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their **decision, whichever way it is given, will, if it stands, finally**

> **dispose of the matter in dispute, I think that for the purposes of these rules it is final.** On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory."

[29] In applying the 'application test', therefore the question to be answered is whether whatever decision had been given by McDonald-Bishop J, whichever way it went, would finally dispose of the claim? The two possible decisions which could have been given by McDonald-Bishop J in the matter were:

i. judgment entered for the claimant; or

ii. judgment entered for the defendant.

This would clearly indicate that a trial of the matter had taken place and not an interlocutory application dealing with whether the court had jurisdiction to hear the claim. The learned judge certainly did not only address the question of whether the matters in issue were governed by the exclusive jurisdiction of the visitor or whether the court had concurrent or some residual jurisdiction. For, if the court was only dealing with the question of jurisdiction, and had ruled against the visitor having exclusive jurisdiction the matter would thereafter have continued in the courts. That ruling therefore would not have fallen under the rubric that 'whichever way it is given' that would have finally disposed of the matters in dispute between the parties. Indeed, that would have been considered an interlocutory order. However, as indicated previously, that was not what the learned judge did, she embarked on a full trial of all the issues before her and made respective findings as set out herein.

[30] As a consequence, at the end of the day, it is my opinion, that only the above decisions (para [29]) were available to the parties and the judgment was a final determination of the claim since the issues in the case having been fully ventilated, 'judgment entered for the claimant' would have brought the claim to an end, liability would have been settled and the applicant would have proceeded to assessment of damages. While, on the other hand 'judgment entered for the defendant' would likewise be a final determination of the claim on the basis that, liability would have also been determined in that the learned judge would not have found the respondent liable to pay damages at all.

[31] The judgment of McDonald-Bishop J being final, the applicant has a right of appeal to this court and does not require permission to appeal. His notice of appeal, however, having been filed on 12 January 2015 would have been outside the 42 days as required by the CAR as it ought to have been filed before 1 November 2014. The applicant would therefore have required an extension of time in order to file, and pursue his appeal. Williams J was correct in finding that the applicant's application in the court below for permission to appeal was misconceived.

[32] In my view, as the applicant acts in person, the overriding objective would demand, in the interests of justice, equity and fairness that he be given an opportunity to file the proper application namely, for an extension of time to appeal, as although he had endeavored to comply with the rules, he was misguided. It is true though that inspite of having received correct advice from Mr Goffe as to how to proceed in this

court, he refused to follow it. However, if he is interested in pursuing the matter in the Court of Appeal he will have no choice but to file the appropriate application for an extension of time to file the notice and grounds of appeal. As is well known, the factors which the court will consider in deciding whether to grant such an extension were stated by Panton JA (as he then was) in **Leymon Strachan v The Gleaner Company Limited and Dudley Stokes** (Motion No 12/1999, judgment delivered 6 December 1999) which states that:

> "(3) In exercising its discretion, the Court will consider-
>
> (i) the length of the delay;
> (i) the reasons for the delay;
> (ii) whether there is an arguable case for an appeal and;
> (iii) the degree of prejudice to the other parties if time is extended.
>
> (4) Notwithstanding the absence of a good reason for the delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done."

[33] It will thus be a matter for the court to decide whether in the circumstances of this case, the applicant will be able to satisfy the court, that the delay has not been inordinate and that there is merit in the appeal. He will also have to attempt to address any prejudice which the respondent may have suffered in the intervening period which may have elapsed before such an application may be filed and heard by the court. The applicant therefore, in my opinion, ought to be given the opportunity to 'put things right' or to 'get his house in order' as it were, and place this matter before the court in accordance with the rules.

[34] The application for permission to appeal would therefore have to be refused. The applicant is to pay the costs.

SINCLAIR-HAYNES (AG)

[35] I too have read the draft judgment of my sister Phillips JA and agree with her reasoning and conclusion.

PANTON P

ORDER

1. The application for permission to appeal is dismissed.
2. Costs to the respondent to be agreed or taxed.