[2015] JMCA Civ 58

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 108/2013

BEFORE: THE HON MR JUSTICE MORRISON P (AG)
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA

BETWEEN	**CARLTON SMITH**	**APPELLANT**
AND	**LASCELLES TAYLOR**	**1ST RESPONDENT**
AND	**COMMISSIONER OF POLICE**	**2ND RESPONDENT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**3RD RESPONDENT**

Hugh Wildman and Miss Barbara Hines instructed by Hugh Wildman & Company for the appellant

Miss Tamara Dickens instructed by the Director of State Proceedings for the respondents

4 and 6 November 2015

MORRISON P (AG)

[1] I have read, in draft, the wholly admirable reasons for judgment prepared by my brother Brooks JA. I agree with them and there is nothing that I can possibly add.

BROOKS JA

[2] This appeal is against the decision and orders of a judge of the Supreme Court made on 30 January 2013 in which she dismissed Mr Carlton Smith's claim for, among other things, a declaration that he had not been dismissed as a district constable.

Background

[3] Mr Smith was appointed as a district constable in 1990 in the parish of Clarendon and was attached to the May Pen Police Station up to 2002. In May 2002, there was an incident at that station. Arising from the incident Inspector Lascelles Taylor made certain accusations against him. Mr Smith asserted that as a result of the accusations he was beaten and locked in the station's cells for two hours.

[4] A subsequent meeting and discussion with Inspector Taylor caused the inspector to apologise to Mr Smith. Nonetheless, Inspector Taylor relieved him of his services for the day and sent him home. Inspector Taylor also cancelled Mr Smith duties and said that "he would ask the Superintendent of Police for the parish to transfer [Mr Smith] to another station in the said parish" (paragraph 17 of Mr Smith's affidavit filed in the Supreme Court on 1 November 2011).

[5] For over a year after that date, Mr Smith received no further communication from the police regarding his status or employment. He remained off the job for the entire time. He retained an attorney who wrote to the Commissioner of Police in relation to the matter. Thereafter, he received a letter from Superintendent Bent, who was the officer in charge of the May Pen Police Station, notifying him of the

superintendent's intention to recommend to the commissioner that Mr Smith's services be terminated. Several meetings were scheduled between the superintendent, Mr Smith and Mr Smith's attorney-at-law. They, however, failed to materialise.

The proceedings in the court below

[6] On 1 November 2011, Mr Smith filed a fixed date claim form. Inspector Taylor, the Commissioner of Police and the Attorney General were the named defendants. They will collectively be referred to in this judgment as the respondents. The claim was supported by an affidavit by Mr Smith. The background set out above was derived from that affidavit.

[7] Mr Smith's claim sought a number of declarations. Chief among them was a declaration that the termination of his services by Inspector Taylor was "unlawful, null and void and of no effect". Allied to that declaration, Mr Smith sought another declaration "that the services of the Claimant as a District Constable could only have been legally discontinued by the Commissioner of Police under Section 2 of the Constables (District) Act". The relevant declarations sought are set out below:

> "1. A Declaration that the termination of the services of the Claimant as a District Constable by then Inspector Lascelles Taylor, is unlawful, null and void and of no effect.
>
> 2. A Declaration that the services of the Claimant as a District Constable could only have been legally discontinued by the Commissioner of Police under Section 2 subsection 2 of the Constables (District) Act.
>
> 3. A Declaration that in the circumstances of this case, the services of the Claimant as a District Constable

could only have been properly discontinued by the Commissioner of Police after having given the Claimant an opportunity to be heard as to the veracity of the allegations made against the Claimant by then Inspector Lascelles Taylor of the May Pen Police Station.

4. A Declaration that the failure to afford the Claimant an opportunity to be heard by the Commissioner of Police before the services of the Claimant as a District Constable were terminated is illegal, null and void and of no effect."

[8] The other declarations that Mr Smith sought spoke to his detention in the cells at the police station. These latter declarations need not be expanded on for reasons that will be set out below.

[9] None of the named defendants filed an acknowledgement of service within the time prescribed by the Civil Procedure Rules (CPR). On 12 March 2012, Mr Smith filed an application for permission to enter judgment against them. The application was fixed for hearing on 4 June 2012.

[10] On 30 May 2012, the respondents filed an acknowledgment of service and a notice of application for court orders asking the court to strike out Mr Smith's statement of case. The ground on which the striking out was claimed was that the issue in the claim should properly have been determined by judicial review since it is a public law matter. The time allowed for a claim for judicial review had, however, long passed. The point was also made in the notice of application that the declaration regarding the allegation that Mr Smith was unlawfully detained, amounted to a claim for false imprisonment and that claim was statute barred. In addition, it was said, the claim was

an abuse of the process of the court. The respondents filed no affidavit in answer to Mr Smith's affidavit.

[11] Both Mr Smith's application for permission to enter judgment and the Attorney General's application to strike out the claim were heard by the learned judge on 30 January 2013. She rendered an oral judgment in which she ordered that Mr Smith's application for permission to enter judgment should be dismissed. The learned judge also struck out his statement of case. It has been gleaned from the notes taken of her oral judgment, that the basis of her decision on the employment issue was that Mr Smith's employment could not be "rooted anywhere but [in] public law". The learned judge also ruled that Mr Smith's complaint about his detention was an attempt to circumvent the statute of limitations and was therefore an abuse of process. The learned judge also pointed out that she was at liberty to consider the delay in bringing the claim and relied on the case of **Joanne Elizabeth Clarke v The University of Lincolnshire and Humberside** [2000] EWCA Civ 129.

The appeal

[12] Mr Smith has challenged the decision of the learned judge on the principal ground that she erred in finding that he should have pursued his claim by way of judicial review. Mr Wildman, on his behalf, pointed to the fact that the learned judge said that "[i]t seems there was no termination" of Mr Smith's employment. That position, learned counsel submitted, was correct, as Inspector Taylor had no authority to terminate Mr Smith's employment. Only the Commissioner of Police had that authority.

[13] In those circumstances, learned counsel submitted, it would be wrong to strike out Mr Smith's claim for a declaration concerning his status. An application for judicial review, Mr Wildman submitted, would be entirely inappropriate as there was no decision made, which the court could be asked to review. Learned counsel argued that Mr Smith was entitled, as of right, to a declaration as to his status.

[14] Mr Wildman further submitted that the learned judge was wrong to have found that Mr Smith's claim could only be founded in public law. He submitted that a district constable was not a public officer as he was not appointed by the Governor-General pursuant to section 125 of the Constitution. Learned counsel argued that the authority to appoint and remove district constables was vested in the Commissioner of Police by virtue of section 2 of the Constables (District) Act. He submitted that Mr Smith had a "bundle of rights" of a private nature. It therefore followed, he argued, that Mr Smith's employment was a matter of private law. Learned counsel cited a number of cases including **R v East Berkshire Health Authority, ex parte Walsh** [1984] 3 All ER 425, **McLaren v Home Office** [1990] IRLR 338, **Regina v Derbyshire County Council, ex parte Noble** [1990] ICR 808 and **Roy v Kensington and Chelsea and Westminster Family Practitioner Committee** [1992] 1 AC 624 in support of his submissions.

[15] Learned counsel also submitted that Mr Smith was entitled, pursuant to rule 56.9 of the CPR, to ask for a declaration of his status. The declaration, Mr Wildman submitted, is an administrative order authorised by rule 56.9. Such an order, he

argued, transcended the issue of whether Mr Smith's employment status lay in public or private law.

[16] Mr Wildman did not advance any arguments in respect of the learned judge's findings on the issue of unlawful detention.

[17] Miss Dickens, for the Attorney-General, in answer to those submissions, sought, at first, to argue that Mr Smith's employment was clearly of a public nature. She argued that Mr Smith was a Crown servant and that there was no private contract of employment. She relied heavily on the decision of this court in **The Attorney General of Jamaica v Keith Lewis** SCCA No 73/2005 (delivered 5 October 2007), in support of those submissions.

[18] After some close challenges to her submissions by the court, Miss Dickens submitted, quite properly, that the real question to be decided was whether the court had the authority to make the declaration sought. She submitted that, having regard to rule 56.9 of the CPR, the court did have that authority regardless of whether Mr Smith's employment status was founded in public or private law. She, therefore, conceded that his claim should not have been struck out.

[19] In assessing the decision in **Lewis**, Mr Wildman, respectfully submitted that bearing in mind the difference between the appointment of district constables and that of public servants, the decision in **Lewis** may be wrong to the extent that there was a finding that a district constable is a person employed in the public service.

The analysis

[20] The concession by Miss Dickens was candidly and correctly made. On the evidence before the learned judge, there was no termination of Mr Smith's employment as a district constable. Under the provisions of the Constables (District) Act, only the Commissioner of Police had the authority to appoint and dismiss Mr Smith. Section 2 of that Act states, in part:

> "2.-(1) The Commissioner of Police may, with the sanction of the Governor-General, appoint in any parish, such number of persons as he may think necessary, being householders resident in such parish, to be district constables, whose power and authority under this Act shall extend to all parts of the Island.
>
> (2) **The Commissioner may at any time remove any district constable so appointed** and appoint some other resident householder in his place." (Emphasis supplied)

It would be curious, in the light of the absence of any evidence that the Commissioner of Police had removed Mr Smith from office, that Mr Smith could be deprived of an entitlement to have this court declare what was the status of his employment.

[21] Both counsel are correct in contending that rule 56.9 allows the court to enquire into that status regardless of whether the employment was founded in public or private law. The rule states in part:

> "**How to make an application for administrative order**
>
> 56.9 (1) An application for an administrative order must be made by a fixed date claim in form 2 identifying whether the application is for –
>
> (a) judicial review;
> (b) relief under the Constitution;
> (c) a declaration; or

(d) some other administrative order (naming it), and must identify the nature of any relief sought." (Emphasis as in original)

It may be gleaned from the rule that judicial reviews and declarations are separate administrative orders that are available to a claimant. The rules in part 56 of the CPR do not place on applications for declarations the restrictions that they place on applications for judicial review. For example, there is no time limit for the making of an application for a declaration, such as applies in rule 56.6, which stipulates that applications "for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose".

[22] It would seem that the criterion for an application for a declaration to be made pursuant to rule 56.9 is that some public body is concerned in the determination of the issue. Rule 56.1 states in part:

"56.1 (1) This Part deals with applications -

(a) for judicial review;
(b) by way of originating motion or otherwise for relief under the Constitution;
(c) for a declaration or an interim declaration in which a party is the State, a court, a tribunal or any other public body; and
(d) where the court has power by virtue of any enactment to quash any order, scheme, certificate or plan, any amendment or approval of any plan, any decision of a minister or government department or any action on the part of a minister or government department.

> (2) In this part such applications are referred to generally as "**applications for an administrative order**"." (Emphasis as in original)

[23] Based on the above analysis, Mr Smith should not be precluded from applying for the remedy of a declaration concerning the status of his employment. Such an application is permitted by rule 56.9. It is true that Mr Smith's claim form mentions rule 8.1(4) in its heading but that is the heading for form 2, which rule 56.9 requires a claimant to file as the originating process. There is, therefore, no procedural defect in Mr Smith's approach to the court. The learned judge was therefore in error in finding that his claim was founded in public law and therefore should have applied for judicial review within the time stipulated for such an application.

[24] Having made that finding, it is unnecessary to decide on the issue of whether or not Mr Smith was a public servant. It cannot be ignored, however, that in **Lewis**, K Harrison JA decided that District Constable Lewis' claim for damages for wrongful dismissal failed for two reasons. One of the reasons was that the claim should have been one for judicial review of the decision rather than by a private claim.

[25] It is to be noted, however, that the issue of whether a district constable was a public servant was not placed in issue in that case. Both sides submitted to the court that District Constable Lewis was a public servant. The decision in **Lewis** should therefore be considered in that light. This is especially so as section 125(1) of the Constitution vests the power to appoint persons to and remove them from public office, in the Governor-General. The section states:

> "Subject to the provisions of this Constitution, power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in such offices is hereby vested in the Governor-General acting on the advice of the Public Service Commission."

Section 125(3) suggests that the Governor-General's removal of the public officer is on the recommendation of the Public Service Commission after a specific process. It is clear, however, that the power given to the Commissioner of Police to remove persons from the post of district constable is not consistent with the scheme set out in section 125 of the Constitution.

[26] It is also to be noted that in the case of **Inland Revenue Commissioners v Hambrook** [1956] 1 All ER 807, to which Harrison JA referred in his judgment, it was held that "the particular and peculiar position of a police constable [and his] duties and authority remove him from the ordinary category of a Crown servant" (page 809). Lord Goddard CJ, who delivered the judgment of the court in that case, also stated that the power of the Crown to dismiss a servant could be affected by statute. He said at page 811:

> "It is settled beyond controversy that the Sovereign can terminate at pleasure the employment of any person in the public service **unless in special cases where it is otherwise provided by law**." (Emphasis supplied)

It would seem that section 2 of the Constables (District) Act is a statutory provision which falls within the category of "special cases where it is otherwise provided by law".

[27] For those reasons **Lewis** does not prevent the court from considering the status of Mr Smith's employment as a district constable.

The order to be made

[28] Having decided that the learned judge erred in dismissing Mr Smith's application for judgment and in striking out Mr Smith's case, the court should next decide on the appropriate orders to be made. Undoubtedly, the appeal should be allowed and the orders for dismissal of the application and the striking out the claim should be set aside. There remains, therefore, the decision on Mr Smith's application for permission to enter a judgment against the respondents. The learned judge had dismissed that application.

[29] In his notice and grounds of appeal, Mr Smith sought an order from this court, pronouncing "that the purported termination of [his] employment was a nullity in consequence of which he is still employed". In oral submissions, however, both Mr Wildman and Miss Dickens submitted that the application should be remitted to the Supreme Court for the application to be heard. Miss Dickens also submitted that the respondents should be allowed to respond to Mr Smith's affidavit evidence.

[30] Although Mr Wildman, in the course of his submissions, argued that there were disputes as to fact to be resolved, this is not correct. There was no evidence placed before the learned judge to contradict Mr Smith's account. There was no application by the respondents for permission to file affidavit evidence. There was no application to cross-examine Mr Smith on his affidavit. In the circumstances, this court is placed in the same position as was the learned judge when the matter came before her.

[31] Where the court determines that the court below was in error, it may set aside the order of that court and substitute such order as it deems appropriate. In respect of

judgments from the Supreme Court, this is contemplated by section 10 of the Judicature (Appellate Jurisdiction) Act. That section gives this court the broad authority to make any order that the Supreme Court could have made. Rule 2.15 of the Court of Appeal Rules (the CAR) expands on that broad authority given by the statute. Rule 2.15(b)(b) confers the power to "give any judgment or make any order which, in its opinion, ought to have been made by the court below".

[32] Miss Dickens' submission that the respondents should be allowed an opportunity to place evidence before the court has the difficulty that there is no indication that the respondents have any evidence to add, which would be useful to the court. In the circumstances, despite the submissions of counsel, the case should not be remitted to the Supreme Court but should be resolved in this court pursuant to the authority conferred by rule 2.15 of the CAR.

[33] The only evidence of an official act in respect of Mr Smith's employment is that he was sent home by Inspector Taylor. There is no evidence that the Commissioner of Police took any step pursuant to section 2 of the Constables (District) Act to remove Mr Smith as a district constable. Paragraphs 17 and 18 of Mr Smith's affidavit speak to this:

> "17. THAT after being apologised to by Inspector Taylor I was relieved of my services for the day and my duties were cancelled. I was sent home by Inspector Taylor who told me then that he would ask the Superintendent of Police for the parish to transfer me to another station in the said parish.
>
> 18. THAT that transfer did not take place and I received no further instructions from the police."

[34] In the absence of any evidence of a removal, it must be stated that Mr Smith remains a district constable appointed by virtue of section 2 of the Constables (District) Act. This court may make appropriate declarations with regard to that finding. Those declarations should be as follows:

> 1. It is hereby declared that the services of Mr Carlton Smith as a district constable could only have been legally discontinued by the Commissioner of Police by virtue of section 2 subsection 2 of the Constables (District) Act.
>
> 2. It is hereby declared that on the evidence before the court, the Commissioner of Police has taken no step, pursuant to section 2 subsection 2 of the Constables (District) Act to remove Mr Carlton Smith from office.
>
> 3. It is hereby declared that Mr Carlton Smith remains a district constable appointed pursuant to section 2 subsection 1 of the Constables (District) Act.

Summary and conclusion

[35] The learned judge was in error in striking out Mr Smith's claim. She was correct in her view that, on his evidence, Mr Smith's employment had not been terminated. In light of that finding, Mr Smith was entitled to have the court declare the status of his employment. The learned judge was, however, in error in finding that Mr Smith's claim could only have been pursued by judicial review and that he was out of time for pursuing such a remedy.

[36] The fact is that Mr Smith was entitled to pursue the remedy of a declaration. That remedy was available by virtue of rule 56.9 of the CPR. Unlike in a claim for

judicial review, there was no time or other restriction on the pursuing of the remedy of a declaration. The learned judge should have allowed Mr Smith to pursue that remedy.

[37] Despite the submissions by counsel on both sides that Mr Smith's application should be remitted to be heard in the Supreme Court, the situation in which this court is placed is identical to that in which the learned judge was placed. This court is therefore entitled to make any order which she could have made. It would not be an efficient use of judicial resources to remit the claim back to the Supreme Court. Mr Smith should have the declarations that his evidence reveals are available to him. Costs of the appeal and of the proceedings in the court below should be awarded to Mr Smith. Such costs should be taxed, if not agreed.

McDONALD-BISHOP JA

[38] I too have read the draft judgment of Brooks JA. I agree with his reasoning and conclusion and there is nothing useful that I could add.

MORRISON P (AG)

ORDER

(a) The appeal is allowed.

(b) The orders of the Supreme Court made herein on 30 January 2013 are hereby set aside.

(c) Judgment for the appellant on the claim.

(d) The following are the declarations to which the appellant is entitled:

1. It is hereby declared that the services of Mr Carlton Smith as a district constable could only have been legally discontinued by the Commissioner of Police by virtue of section 2 subsection 2 of the Constables (District) Act.

2. It is hereby declared that on the evidence before the court, the Commissioner of Police has taken no step, pursuant to section 2 subsection 2 of the Constables (District) Act to remove Mr Carlton Smith from office.

3. It is hereby declared that Mr Carlton Smith remains a district constable appointed pursuant to section 2 subsection 1 of the Constables (District) Act.

(e) Costs of the appeal and of the proceedings in the court below to the appellant. Such costs are to be taxed if not agreed.