[2021] JMSC Civ. 27

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2021CV00054

BETWEEN	**DION STAPLE**	**APPLICANT**
AND	**THE PUBLIC ACCOUNTANCY BOARD**	**RESPONDENT**

IN CHAMBERS

Ms. Tavia Dunn and Mr. Marlon C. Bennett instructed by Marlon C. Bennett of Counsel for the Applicant

Mr. Emile Leiba and Ms. Chantal Bennett instructed by Dunn Cox for the Respondent

Heard: January 15, 2021, January 18, 2021, January 29, 2021 and February 12, 2021

Application for Interim Injunction – Whether an ordinary claim is really a claim for judicial review – Is there a serious question to be tried.

CARR, J (AG.)

Background

[1] The Applicant, Mr. Dion Staple, is a registered public accountant. A complaint was made against him to the Public Accountancy Board (PAB) by two companies Simber Production Limited and SMS Productions Limited. The Board after a meeting with the Applicant and the complainant found that there was a prima facie case that warranted a hearing in accordance with the Public Accountancy Act. A

date was scheduled for the hearing and the Applicant was notified by letter. In response the attorney at law on behalf of the Applicant wrote to the PAB requesting that the matter be stayed, this request was refused.

[2] On the 5th of January 2021 the Applicant filed a fixed date claim form seeking the following relief:

a. A declaration that the actions of the Public Accountancy Board are in breach of the Applicant's constitutional right to a fair hearing by an independent and impartial tribunal by its refusal to provide the applicant with documentary evidence in support of the charges as framed by the Public Accountancy Board.

b. A declaration that the Public Accountancy Board acted ultra vires in particularizing grounds in support of the charges against the Applicant when it was the Complainant who should do so in writing.

c. A declaration that the Public Accountancy Board acted in breach of the principles of natural justice.

d. An interim injunction restraining the Public Accountancy Board from embarking on any enquiry in respect of charges framed out by the Public Accountancy Board against the Applicant until the documentary evidence to support these charges are provided, which includes all documents to support the claim that a prima facie case has been established against the Applicant.

[3] The Applicant also filed a notice of application seeking an interim injunction restraining the PAB from embarking on an enquiry. The date given by the court for the application to be heard was subsequent to the date set by the PAB for the hearing and so by way of a further amended Notice of Application for court orders filed on the 25th of January 2021 the Applicant revised the relief sought as follows:

a. An interim injunction restraining the Public Accountancy Board from embarking on any further enquiry, meetings, and issuing any decision in respect of charges framed out by the Public Accountancy Board in a complaint brought against the Applicant until the substantive claim filed herein is determined.

[4] On the date of the hearing of the application counsel for the Respondents raised a preliminary objection. It was submitted that the court has no jurisdiction to grant interim relief against a statutory body restraining the exercise of its statutory function in the absence of an application for permission to commence judicial review proceedings or a substantive claim for judicial review being before the court.

[5] The claim it was argued, was seeking to restrain a public body lawfully exercising its statutory function in a case where there was no claim in public law. The issues raised by the fixed date claim form and the relief sought all relate to public law remedies and there is in fact no private law claim to be determined.

Submissions on behalf of the Applicant and Respondent on the preliminary objection

[6] The submission of Counsel for the Respondent focused on the fact that this matter was brought by way of an ordinary claim when it is really a claim in public law. The claim, he suggested, is in reality a claim for judicial review and therefore not properly before the court since the Applicant is required to first obtain leave. The court therefore ought not to make an order for an interim injunction since the proper procedure was not followed.

[7] In response to these submissions Counsel for the Applicant relied on the Privy Council authority of **The Honourable Attorney General v. Isaac**[1]. The case highlighted the position in English law. The basic principle, it was held, is that it would be an abuse of process of the court for a Claimant to bring an ordinary action where what was being sought was redress for the infringement of public law rights.

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[1] [2018] UKPC 11

Counsel however sought to make the point that the Privy Council made a distinction between the English law position and that of Antigua & Barbuda (where the case originated), and posited that the very same distinction would apply to Jamaica. This she said was because of the codification of the procedure to be adopted in filing public law claims as set out in the Civil Procedure Rules.

[8] Although the Board accepted that in some cases it may be necessary to look carefully at the substance of the application rather than the form in which it is cast the first step is to look at the remedies sought. The Applicant in this case, it was argued, is seeking declarations and an interim injunction. There is no request for an order of mandamus, certiorari or prohibition. Although the list of remedies by way of judicial review is not closed, it affords the court a basis upon which to determine whether the applicant is in fact seeking a remedy which can only arise after judicial review. There being no request for any of the aforementioned orders, the preliminary objection according to counsel must fail.

Discussion and Analysis

The Preliminary Objection

[9] The Civil Procedure Rules (CPR) makes provision for applications for a declaration or an interim declaration in which a party is the State, a court, a tribunal or any other public body.[2] The rule protects the right of Applicants who seek declaratory relief in circumstances where they do not want to invoke the Courts' power to make any orders pursuant to judicial review.

[10] The Judicature (Supreme Court) Act gives the court the discretion to grant an injunction.

> **"A mandamus or an injunction may be granted or a receiver appointed, by an interlocutory order of the Court, in all cases in which it appears to the Court to be just or convenient that such an order be**

[2] CPR 56.1 (1) (c)

made either unconditionally or upon such terms and conditions as the Court thinks just."[3]

Additionally, the CPR provides,

"In addition to or instead of an administrative order the court may, without requiring the issue of any further proceedings, grant –

(a) An injunction."[4]

Based on these two provisions it is pellucid that the court has the jurisdiction to grant injunctions for matters which are brought by ordinary claim as well as matters of an administrative nature.

[11] This action was brought as an ordinary claim. Whether it is a claim of an administrative nature or not, this should not prevent the Applicant from having his application heard on its merits. The courts have over the years moved beyond striking out matters that are brought improperly. A more liberal approach has been adopted especially towards claims that are brought under administrative law. In light of the fact that the rules provide for a matter that ought to be a claim in judicial review to be dealt with as such, in cases where it was brought as an ordinary claim[5], I cannot agree with Counsel for the Respondent that the court does not have the jurisdiction to make an order for an interim injunction. The claim presently before the court is an ordinary one, even if I were to find that it is properly a claim for judicial review an interim injunction can still be granted. The preliminary objection therefore has no merit.

The Substantive Application

[12] Both Counsel for the Applicant and the Respondent made submissions in writing and orally. I am grateful for their industry and arguments. However, I will only make reference to their submissions where applicable in the discussion of the issues.

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[3] The Judicature (Supreme Court) Act Section 49 (h)

[4] CPR 56.1 (4) (a)

[5] CPR 56.7

The Law

What are the legal principles applicable to the granting of an interim injunction?

[13] The test as laid down in **American Cyanamid Co. v. Ethicon Ltd.**[6] is well known and is summarized as follows:

a) Is there a serious question or issue to be tried?
b) Whether damages is an adequate remedy?
c) Where does the balance of convenience lie?

It is only where there is uncertainty as to the first two limbs that the court should seek to determine the balance of convenience. The overarching principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other.

Analysis and Discussion

Is there a serious question to be tried?

[14] Lord Diplock in **American Cyanamid** at page 510 of the judgment explained the principle in this way:

> **"The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words that there is a serious question to be tried. It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."**

In essence can the Applicant establish, based on affidavit evidence, that he would be successful in obtaining a permanent injunction at the trial of this matter? If the answer to this question is in the negative then an interlocutory injunction should not be granted.

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[6] [1975] ALL ER 504

[15] There are two main issues which fall for discussion under this principle. Firstly, whether the claim was properly brought before the court and secondly, whether there was a breach of the Public Accountancy Regulations.

Is the claim properly before the court?

[16] The position of Counsel for the Respondent is that this is a claim for judicial review cloaked as an ordinary claim. Having not proceeded by way of an application for leave to apply for judicial review the claim is not properly before the court. The Applicant has made it clear that they do not wish to proceed by way of judicial review.

[17] The Public Accountancy Board was established by the Public Accountancy Act.

> ***"The functions of the Board shall be, generally, to promote, in the public interest, acceptable standards of professional conduct among registered public accountants in Jamaica, and in particular (but without prejudice to the generality of the foregoing) to perform the functions assigned to the Board by the other provisions of this Act."***[7]

[18] **"The Board shall take disciplinary action against registered public accountants for the breach of any provision of this Act or any regulation made hereunder."**[8] A registered public accountant is defined as a person whose name is on the register, not being a person whose registration is for the time being suspended[9]. It is the Board that registers applicants who qualify as public accountants and the application shall be accompanied by a prescribed fee. It is clear therefore from a cursory look at the legislation that the Public Accountancy Board is a public body exercising a statutory function.

[19] Mr. Leiba relied heavily on the Supreme Court decision of **Inspector Max Marshalleck v. The Inspectors' Branch Board of the Police Federation and Superintendent K.A. Wade**[10] Sykes, J (as he then was) delved into the English

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[7] The Public Accountancy Act Section 4 (1)
[8] The Public Accountancy Act Section 4 (2) (d)
[9] The Public Accountancy Act Section 2
[10] Claim No. HCV 1499 of 2004

law position on this point by reviewing the cases up to the time of judgment. He opined as to the principles of law at page 9 of the judgment.

> ***"A claimant cannot escape the procedural requirements for judicial review by filing an ordinary action where no issue of private law arises…A claimant can initiate an ordinary action if the action implicates private law issues despite the fact that the defendant is a public body acting under a statute."***

[20] Following that decision other cases have been decided in jurisdictions with similar provisions under the Civil Procedure Rules as that in Jamaica. In the privy council decision of the **Honourable Attorney General v. Isaac**[11], Lady Black in delivering the judgment made reference to the **Belize Bank**[12] case and the Court of Appeal's rejection of the view that the CPR 56.1(1) (b) (equivalent to the Jamaican CPR 56.1(1) (c)) should be limited to declarations concerning private rights. Instead it was held that claimants seeking declaratory relief in relation to public law issues were not obliged to bring judicial review proceedings.

[21] It is useful to set out the rule that was examined in the judgment.

"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."**[13]

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[11] Supra. 1.

[12] The Belize Bank Limited vs. The Association of Concerned Belizeans and others Civil Appeal No. 18 of 2007.

[13] Belize CPR 56.1 (1) (b)

[22] In recognizing the distinction between the English position and that of Antigua and Barbuda Lady Black at paragraph 34 of the judgment concluded that **"…in some cases it may be necessary to look carefully at the substance of the application, rather than the form in which it is cast."** However, she also noted at paragraph 41 that **"…when scrutinizing the substance of an application to see whether it is properly classed as a judicial review application, it will be of central importance to consider whether relief in the form of any of the orders listed in CPR 56.1 (3) is sought."**

[23] Rule 56.1 (3) is equivalent to Rule 56.1 (3) of our own rules which set out the remedies available under judicial review.

"Judicial Review" includes the remedies (whether by way or writ or order) of –

> **(a) Certiorari, for quashing unlawful acts;**
>
> **(b) Prohibition, for prohibiting unlawful acts; and**
>
> **(c) Mandamus, for requiring performance of a public duty, including a duty to make a decision or determination or to hear and determine any case."[14]**

[24] The fixed date claim form filed by the Applicant did not seek any of the remedies as set out under Rule 56.1 (3). The test however does not stop there as the court can go on to look at the substance of the claim. This case can be distinguished from that of the claim considered in the privy council decision. The Applicant in the present case is seeking an interim injunction to restrain the Respondent from continuing the enquiry and making any decisions until the hearing of the substantive claim. Although it is set out as an interim injunction, by the very nature of the request it would mean an end to the proceedings of the disciplinary committee.

[25] Lady Black at paragraph 43 opined that the applicant in that case was not seeking to have any continuing act or threatened unlawful act prohibited, in the present

[14] CPR 56.1 (3)

case that is exactly what the Applicant is seeking by way of an interim injunction. In fact, as part of their submissions Counsel for the Applicant intimated that if the Respondent proceeds to make a ruling the claim would be rendered nugatory. If all the Applicant is seeking are declarations, that statement cannot be valid. It is clear therefore that the true claim is to prohibit the continued "unlawful" act of the Respondent. The matter ought then to have been brought by way of judicial review and the Applicant would therefore have no serious issue to be tried since they did not seek the leave of the court to bring such a claim.

Did the Respondent breach the Public Accountancy Regulations?

[26] Ms. Dunn argued on behalf of the Applicant that the claim was seeking to challenge the actions taken by the Respondent with respect to his request for documentation which led to the finding of a prima facie case for him to respond to. Because the Public Accountancy Act only gives a right of appeal where the Board has exercised its' disciplinary powers she submitted that the real issues to be tried can only be dealt with by the hearing of this claim.

[27] The Applicant has averred through his affidavit in support of this application that he was not given a fair hearing. In this regard he set out his grounds for the application in the further amended notice of application for court orders as follows:

a. The Respondent breached section 16 (1) (d) of the Public Accountancy Regulations, 1970 by not informing the Applicant of the date of the meeting when his explanation would be considered.

b. The Respondent did not provide the Applicant with any information to confirm whether his explanations were considered by the Respondent as required by section 16 (2) of the Regulations.

c. As per section 18 of the Regulations, the Board concluded that a prima facie case was made out against the Applicant without providing him with the documentary evidence used to determine the charges including:

   i) Evidence that the former employee was his servant and/or agent.
   ii) Evidence that he was engaged to make representations to the TAJ on behalf of the Complainants.

iii) Evidence to suggest that the discovery of the fraud was initiated by notices generated from TAJ and sent to the Complainants.

d. As per section 15 of the Regulations, the complaint grounding the charges must be in writing from the complainant. However, by letter dated December 8, 2020, the particulars of the charges as framed by the Respondent, is not consistent with the complaint of the Complainants and are prejudicial to the Applicant in light of the fact that the Respondent has not provided him with any documentary evidence to meet a defence to these charges.

e. As per sections 26 and 27 of the Regulations, the Applicant will not be prepared to answer the charges as framed by the Respondent at the hearing, having not been provided with the evidence grounding these charges.

f. As per section 22 (1) of the Regulations, the documents on which the complainants are relying at the hearing are not consistent with the charges as framed by the Respondent.

g. The Respondent proceeded with the hearing on January 7, 2021 without the presence of the applicant despite being served with court documents for a hearing on the matter fixed for January 15, 2021 at 10:00 am in the Supreme Court. The hearing also proceeded even when the Respondent became aware that the zoom meeting link for the said hearing was not received by the Applicant.

h. The respondent proceeded to have another hearing on January 14, 2021 without the applicant and without issuing any formal written notice of the hearing to the applicant.

[28] I will examine each purported breach and the response of the Board.

Was the Applicant advised of the date of the meeting at which his explanation would be heard?

[29] Regulation 16 (1) states:

> **"Where the Registrar makes a complaint or reports to the Board that a complaint or information pursuant to regulation 14 or 15 has been received in respect of a registered public accountant the Board shall direct the Registrar to write to such accountant-**

(a) Notifying him of the receipt of the complaint or information, and indicating the matters which appear to raise a question whether the registered public accountant has procured his registration as a result of a misleading or fraudulent representation, or has committed professional misconduct;

(b) Forwarding a copy of any affidavit or other document relating to the allegation;

(c) Inviting the registered public accountant to submit to the Board any explanation which he may have to offer;

(d) Informing the registered public accountant of the date of the meeting of the Board at which his explanation, if any will be considered.

(2) The documents (including the explanation, if any, of the registered public accountant) shall be referred to the Board at the meeting held on the specified date."

[30] Mr. Compton Rodney, on behalf of the PAB, in his affidavit filed on the 15th of January 2021, exhibited a letter dated December 8, 2020 which indicated that the Board met with the Applicant on the 28th of September 2020 at which time the Applicant was allowed to ventilate his position with respect to the complaint. . In order for the Applicant to be present at the initial meeting he had to have been advised of the date. It therefore cannot be said, having considered the contents of that letter, that there was a breach of Regulation 16 (1) (d).

Did the Respondent provide information confirming the consideration of his explanations?

[31] Regulation 16 (2) does not require the Board to indicate whether or not the Applicant's explanation was considered. It merely states that the explanation should be referred to the Board.

[32] Regulation 18 provides, **"In any case in which the Board, having considered the allegations and the explanation, if any, of the registered public accountant, is of the opinion that a prima facie case is shown, the Board**

shall fix a day for the holding of an enquiry". By way of letter dated the 8th of December 2020, the Board did indicate that after considering the complaint and the explanations provided they found that a prima facie case had been made out and therefore would proceed to a hearing.

Was the Applicant provided with the documentary evidence used to determine the charges?

[33] At paragraph 6 of the Affidavit of Mr. Compton Rodney on behalf of the PAB reference was made to a letter which was issued by the Board dated August 12, 2020. In that letter the applicant was advised of the documents relating to the allegation and they were also attached to the letter. It is that documentation as well as the explanation that was given by the Applicant that was considered in accordance with Regulation 18.

Was the complaint in writing?

[34] Regulation 15 **"where a complaint in writing, or information in writing, is received by the Registrar from any person or body who alleges that a registered public accountant has committed in the performance of his professional duties –**

> **(a) An act of professional misconduct, or of grave impropriety, or infamous conduct; or**
>
> **(b) An act of gross negligence or of gross incapacity; or**
>
> **(d) An act which constitutes conduct discreditable to the profession, the Registrar, after making such further enquiries relative thereto as he thinks necessary, shall report the matter to the Board."**

Exhibited to the Affidavit of Mr. Rodney (filed January 15, 2021) was the letter comprising the complaint of Simber Production Limited and SMS Productions Limited. The letter was sent by the attorneys-at-law for the companies Levy Cheeks and outlined in full the facts that they were relying on as well as the alleged

breaches by the Applicant. Although the letter sent to the Applicant paraphrased the complaints outlined in the letter sent by Levy Cheeks I do not find that there is a substantial difference that would cause any prejudice to the Applicant especially in light of the fact that he had in his possession the actual letter of complaint and was given an opportunity to provide an explanation at the meeting with the PAB.

Has the Applicant been provided with the evidence grounding the charges?

[35] By letter dated January 6, 2021 at paragraph 2 Mr. Rodney stated, *"I had sent to you by email on December 24, 2020 copies of the documents on which the complainant intends to rely during the hearing. I am sending herewith hard copies of those documents."* The Applicant did not file an affidavit in reply challenging this evidence. As a result, the evidence before the court is that the documents on which the complaint was based were sent to the Applicant.

Did the Board advise the Applicant of the date for the hearing?

[36] Regulation 20 (1) states **"when the Board has fixed a day for the holding of an enquiry, the Registrar shall forthwith serve on the registered public accountant a notice in writing which shall-**

> **a) Specify the nature and particulars of the charge or charges against him;**
>
> **b) State the date, time and place at which the enquiry will be held**
>
> **(2) The enquiry shall be fixed for a date not less than twenty-one days from the date of notice.**
>
> **(3) The notice may be delivered personally to the registered public accountant or may be sent by prepaid registered post to his registered address.**

[37] Regulation 25 is also relevant it provides;

"If either or both parties fail to appear either personally or by a representative, the Board may, if it thinks fit, and on being satisfied as to the service of the notice of enquiry, proceed with the hearing."

As previously indicated Mr. Rodney in his Affidavit exhibited the letter which was sent to the Applicant, dated the 8th of December 2020, advising him of the date for the disciplinary hearing.

[38] A follow up letter was also sent on the 6th of January 2021 in which the meeting date was again provided and the Applicant was reminded of regulation 25. The letter was also sent by e-mail to counsel for the Applicant. There is no evidence to suggest that the Board was aware that the zoom link for the hearing was not received. Although this was set out in the amended notice of application there was no affidavit before the court which supported that assertion. The hearing was part heard and concluded in the absence of the Applicant as per regulation 25.

[39] It is apparent that all steps as per the regulations were complied with and that the Applicant acted to his detriment in not participating in the hearing by providing his own documentation in response to the allegations. The material as presented does not disclose a case which the court considers to be one that has any real prospect of success. There is therefore no reason to go on to the question of damages. However, I wish to make a comment on that point nonetheless.

Are damages an adequate remedy?

[40] The dictum of Lord Diplock in **American Cyanamid**[15] solidified the principle as to damages as follows:

"The court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award in damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought as enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at

[15] Supra.6. p. 408

common law would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted."

[41] The Applicant has said that the damage to his reputation would be such that it could not be covered by an award in damages. I cannot agree. The fact is that the damage to his reputation is no different from any other employee who has to go through a disciplinary hearing. In the event that there is an adverse finding and he challenges it by way of either the court of appeal or judicial review and is successful he has a remedy in damages against the PAB, and his reputation would be unassailable, as the decision of the Board would be overturned. The PAB as a statutory body has the necessary resources to satisfy any such award in damages.

Disposition

[42] Having regard to the reasoning above I cannot find that there is a serious issue to be tried. The Applicant having not been able to pass the first hurdle of the test must fail in his application for an interim injunction.

Order:

1. The application for an interim injunction is refused.
2. Costs to the Respondent to be agreed or taxed.