



[2014] JMSC Civ. 117

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2013 HCV 02166

BETWEEN DR. SANDRA WILLIAMS-PHILLIPS CLAIMANT
AND UNIVERSITY HOSPITAL BOARD OF MANAGEMENT DEFENDANT

Kimone Tennant, instructed by Don Foote, for the Claimant

Christopher Kellman, QC and Krishna Desai, instructed by Myers, Fletcher and Gordon, for the Defendant

Heard: May 22 and 26, 2014

APPLICATION FOR CONSOLIDATION OF CLAIMS – DISTINCTION BETWEEN CONSOLIDATION OF CLAIMS AND TRYING OF TWO CLAIMS AT THE SAME TIME – WHAT COURT SHOULD CONSIDER IN DECIDING ON WHETHER CLAIMS SHOULD BE CONSOLIDATED

ANDERSON, K., J

[1] The claimant has filed a notice of application for court orders and did so on February 17, 2014, seeking primarily, a court order to consolidate the claim within which that application was made, that being Claim No. HCV 02166 of 2013, with another claim which she is currently pursuing against the same defendant, that being Claim No. HCV 00103 of 2013. The latter is primarily a claim for arrears of salary, arising out of the claimant's employment contract with the defendant, during the period of time while she was employed by the defendant as a sessional cardiologist. The former is primarily a claim for damages for wrongful and/or unfair and/or unjustifiable

dismissal and also a claim for a Declaration that the claimant be reinstated in her post as a sessional cardiologist with the defendant.

[2] The defendant has also filed an application for court orders, seeking thereby, to have this court order that Claim No. HCV 02166 of 2013, be transferred to the Magistrate's Court as it falls within the jurisdiction of the Magistrate's Court. In that application, the defendant has also sought an alternative order that this court lacks jurisdiction to try the claims for unfair and unjustifiable dismissal.

[3] The claimant has not set out in Claim No. HCV 02166 of 2013 precisely how much the claimant is seeking to have this court award to her, if she is successful in proving that claim, but her attorney – Ms. Tennant, told this court during her oral submissions, that the quantum will ultimately be determined by this court, depending on the evidence which is to be led at trial.

[4] As the application to transfer a part of Claim No. HCV 02166 of 2013, to the Magistrate's Court, has been framed in the alternative, this court must first address its mind as to whether such claim falls within the jurisdiction of the Magistrate's Court.

[5] Despite the persuasive arguments of defence counsel, this court has not been persuaded in that respect, by same. This is because, at present, there does not exist in respect of the claimant's particulars of claim in Claim No. HCV 02166 of 2013, any particularization of the details of the gross salary figure of the claimant, as at the date of the termination of her employment with the defendant. There exists such particularization in affidavit evidence filed by the defendant in response to this application. That affidavit evidence as to the net pay of the claimant in April and May, 2012, has not, in that specific respect, been expressly contradicted by the claimant and thus, this court considers such averments as proven, for the purposes of the defendant's application for court orders. Those averments are set out in paragraph 9 of Dr. T. McCartney's affidavit which was filed by the defendant on May 20, 2013. In that regard, it is also important to note that the claimant claims that she was summarily dismissed, by letter addressed to her by the defendant and dated April 20, 2013 – see

paragraph 7 of the particulars of claim. The fact that such averments have been proven though, does not mean that the claimant's claim for wrongful dismissal/unfair/unjustifiable dismissal, must be transferred to the Magistrate's Court.

[6] As things now stand, on the one hand, the claimant claims that she can be and should be awarded general damages arising from her claim for wrongful, unfair, unjustifiable dismissal. If so, then her claim must remain in this court, since a claim in the Magistrate's Court seeking an award of damages in circumstances such as alleged in Claim No. HCV 02166 of 2013 would have to be restricted to a specific sum, within the ambit of the Magistrate's Court's jurisdiction. As presently framed therefore, this court would have to draw conclusions of fact and of law, arising from the defendant's application, which it cannot, at this stage and in these circumstances, properly draw, in order to conclude that the claimant's claim No. HCV 02166 of 2013 must be adjudicated on in the Magistrate's Court. Matters as to the quantum of damages to be awarded in a claim for general damages for the relevant causes of action, must either be decided on by this court after a trial, or alternatively, arising from an application by the defendant, if such application were ever to be made by them, for summary judgment. No such application has, as yet, been made by the defendant herein and this matter has not yet reached the trial stage.

[7] If warranted and an appropriate application is made to this court for same, it may be that this court can award summary judgment for the defendant on the issue of the claimed award for general damages, if it is indeed the law, that general damages cannot properly be awarded by this court, in respect of a claim for damages for wrongful dismissal. This would be the same approach that could be taken by the defendant with respect to the claimant's claim for a declaration from this court that she be reinstated to her post as a sessional cardiologist with the defendant. No such application has, as yet, been made to this court by the defendant. It is not open to this court to grant any such relief, when no such relief has been sought by the defendant. Furthermore, it is not open to this court, on the hearing of these applications for court orders, to require that the claimant amend her claim for the reliefs that she is seeking. What this court must instead do, is consider the reliefs being sought and adjudicate on whether same, as

filed, ought to be transferred to the Magistrate's Court. This court has found itself unable, at this stage, to properly so conclude.

[8] In respect of the jurisdiction point though, the defendant has complied with the requirements of **rule 9.6 of the Civil Procedure Rules (CPR)** and thus, is properly able to pursue that point. This court, based on the decided cases from this very court, of: **Lindon Brown and Jamaica Flour Mills Ltd** – Claim No. CL 2000/B199, and also, **Calvin Cameron and Security Administrators Ltd** – Claim No. HCV 02271 of 2007 and also relying on the case: **Village Resorts Ltd and Industrial Disputes Tribunal** (hereinafter referred to as 'the IDT') – SCCA No. 66 of 97 – Delivered on June 30, 1998, as well as, most importantly, the recently amended provisions of the **Labour Relations and Industrial Disputes Act**, has concluded that it is pellucid, that a claim for damages for unfair, or unjustifiable dismissal, cannot properly be pursued in this court. This court has never had jurisdiction to try same, as these are not torts known to the common law. These are torts recognized by statute, both in England, as well as, more recently, in Jamaica. This court therefore, has no jurisdiction to try a claim for unfair or unjustifiable dismissal. It does though, have jurisdiction to try a claim for damages for wrongful dismissal. Whether this court can properly award general damages in such a claim cannot though, now be determined by this court in the present circumstances. It remains only to be said though, that wrongful dismissal if proven, constitutes a long established court recognized claim for relief arising from a breach of contract.

[9] This court thus, orders that it has no jurisdiction to try claims for damages for unfair and/or unjustifiable dismissal. Such a 'claim' must be pursued before the IDT.

[10] As regards the claimant's application for consolidation of claims, this court notes that there is a distinction to be drawn between this court hearing two separate claims 'together', or in other words, at the same time and consolidating claims. That this is so, is made apparent by the wording of **rule 26.1(h) of the CPR**. When claims are consolidated, those claims become one. They are essentially, merged. See: **A. Goninan and Company v Atlas Steels** – [2003] NSWC 956, at paragraph 28, per Austin J. This court though, as part of its overall case management powers, can make

an order consolidating claims. **Rule 8.3 of the CPR** should guide this court in that respect. It should, because it is a rule which enables a claimant to use a single claim to include all or any of those claims which can be conveniently disposed of in the same proceedings. It cannot be that this rule can be relied on before a claim has been filed, but is of no relevance or significance in respect of an application for consolidation. Such an approach by this court, would not be in keeping with the 'interests of justice.' Instead, it would be more in keeping with the older, more rigid approach to civil practice and procedure in this court. If therefore, two or more claims have previously been filed, but this court considers that the same can be conveniently disposed of together, then this court not only can, but should make a consolidation order.

[11] Can these claims be conveniently disposed of together? One of these claims – Claim No. HCV 02166 of 2013 is a claim for damages for wrongful and/or unfair and/or unjustifiable dismissal. The other – Claim No. HCV 00103 of 2013 is a claim for arrears of net salary, for the period of January 1, 2009 to April 20, 2012 and is at its essence therefore, a claim for damages for breach of contract, wherein the total amount claimed, inclusive of court fees and attorney's fixed costs, is \$9,100,410.34.

[12] Whilst it is true that the parties to both claims are the same and that both claims pertain to same extent, to matters surrounding the employment contract as between the claimant (in both claims) and the defendant (in both claims), in and of itself, these two factors, even when considered by this court, collectively, would not necessarily require that the court conclude that it would be convenient for both claims to be disposed of together.

[13] Since it is that this court has concluded that the claimant's claim for damages for unfair and/or unjustifiable dismissal cannot be maintained before this court, but must instead, if intended to be pursued, be so pursued before the IDT, all that remains of Claim No. HCV 02166 of 2013, is the claim for damages for wrongful dismissal and attendant reliefs, included amongst which is a declaration that the claimant is to be reinstated to her post as a sessional cardiologist with the defendant.

[14] It is worthwhile to make reference to that which has been stated in the text – ‘**Civil Procedure,**’ Vol. 1 [2004] – commonly termed as, ‘The White Book,’ as to the circumstances in which an order for consolidation may be appropriate and in which, such an order may be inappropriate. Prior to quoting from that text though, it is worthy of note that in that text, the editors have made it clear, in interpreting England’s rule of court, that being **rule 3.1 (2) (g)**, which is worded precisely the same as **Jamaica’s Civil Procedure Rule 26.1 (2) (b)**, that nowadays, the rule of court which addresses the court’s power to make an order consolidating proceedings, is far more flexible than it once was. As such, whilst consolidation may be permitted where the joinder of claims and the joinder of parties that results from such consolidation, would satisfy the law as to such joinder, this does not at all mean, that consolidation should be ordered in all such circumstances, since overall, the court must, in deciding as to whether or not to make an order of consolidation, take care to act justly.

[15] **The White Book** also goes on to state, at **paragraph 3.1.10**, that,

*‘Under the former rules, consolidation of proceedings could be ordered where it appeared to the court (a) that some common question of law or fact arose in both or all of them, (b) that the rights to relief claimed were in respect of, or arose out of the same transactions or series of transactions, or (c) that for some other reason it was desirable to make an order for consolidation. These conditions reflected the fact that the main object of the consolidating power was to save costs and time by avoiding a multiplicity of proceedings covering largely the same ground. **Rule 3.1 (2) (g)** contains no such confining conditions. But as the court, in exercising this power, must seek to give effect to the over-riding objective, the conditions stated in the former rules, are bound to remain important considerations.... Aspects of the overriding objective other than those concerned with cost and delay may also be engaged in the question, whether consolidation should be ordered (e.g. ensuring that the parties are on an equal footing and dealing with the case in ways which are proportionate). Upon investigation it may be recognized that the advantages sought to be achieved by an application for consolidation may be achieved by an order under **rule 3.1 (2) (h)** for the several claims to be tried on the same occasion and that an order for consolidation is neither desirable nor necessary.’*

[16] This court, in applying the aforementioned legal learning to the matter at hand, must state that no common question of either law or fact arises in both claims and also, the alleged rights to the reliefs claimed in each of the claims, does not at all arise out of the same transaction or series of transaction. Furthermore, this court takes the view that what the claimant is really desirous of achieving, by means of her application, will be not so much, a consolidation of the claims, but rather, the equivalent of an order that the claims be tried together. These are two separate concepts, although utilized in this court, from time to time, as though they are one and the same. With consolidation, there should be only one statement of case, which should incorporate both claims. This must be so, since as stated earlier in these reasons, the effect of the consolidation of proceedings is to combine two or more claims so that they will thereafter proceed as one claim. **The White Book at paragraph 3.1.10**, has expressly confirmed that this is so and that this is to be distinguished from the making by this court, of an order that two or more claims, be tried on the same occasion (**rule 26.1 (2) (h)**).

[17] As it is now, if this court were to make an order for consolidation, the parties would have to redraft their respective clients' statement of case. Rather than saving costs, this would increase costs and moving forward, no costs would be saved by consolidating the claims, since the issues and facts in the claims are for the most part, completely separate and distinct. As such, the 'interests of justice' as per **rule 1.1 of the CPR**, do not justify this court in granting the consolidation order as sought.

[18] As stated by the author – Stuart Sime, in his text – '**A practical approach to Civil Procedure, 9th ed. [2006]**, *'closely connected claims may be ordered to be consolidated. This means that they will continue and be tried as if they were a single claim. Consolidation is likely to be convenient only where there is a strong overlap between two claims, or where there is a risk of irreconcilable judgments. Where there is minimal overlap, consolidation is inappropriate.'* See: **The Law Corporation (Channel Islands) Ltd** – [2001] LTL 12/11/01.

[19] In the case at hand, there is nought but minimal overlap between the two claims which the claimant now seeks to have consolidated. In the circumstances, this court has refused to make the order as was sought in that respect.

[20] This court therefore, made the following orders, in respect of the application for court orders which was filed by the claimant on February 17, 2014 and that which was filed by the defendant, on May 20, 2013:

- (i) The claimant's application for court orders which was filed on February 17, 2014, is denied and costs of that application are awarded to the defendant, with such costs to be taxed if not sooner agreed.
- (ii) The defendant's application for court orders, which was filed on May 20, 2013, is partially granted, but only to the extent that it is concluded that this court has no jurisdiction to try the claim for damages for unfair and/or unjustifiable dismissal.
- (iii) The defendant's said application to not have this court exercise jurisdiction to try the claim for damages for wrongful dismissal, is denied.
- (iv) The costs of the defendant's said application for court orders, shall be borne equally by the parties.
- (v) The defendant is granted until July 7, 2014, to file a defence to this claim, in respect of the claim for damages for wrongful dismissal.
- (iv) Case Management Conference shall be held before a judge in Chambers, on November 7, 2014, commencing at 11:00 a.m., for 30 minutes.
- (vii) The defendant shall file and serve this order.

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Hon. K. Anderson, J.