

IN THE COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division
2022/CLE/gen/01485

B E T W E E N:

BENJAMIN F. THOMAS

Claimant

AND

THE DEPARTMENT OF EDUCATION

First Defendant

AND

THE MINISTRY OF FOREIGN AFFAIRS

Second Defendant

THE ATTORNEY GENERAL

Third Defendant

Before: **The Honorable Madam Justice Carla Card-Stubbs**

Appearances: Joseph Moxey of Counsel for the Claimant
 Rashied Edgecombe of Counsel for the Defendants

Hearing Date: February 12, 2024

Defendants' Application to strike out Statement of Claim- Claimant's Application to Strike Out Defence – Part 26 CPR - Whether action statute-barred - Section 12 Limitation Act- Recurring breach

The Claimant applied to strike out the Defence and for judgment against the Crown. The Defendants applied to strike out the claim. The Defendant also argued that the claim was statute-barred. The Claimant's claim was for pension payments said to be due and payable.

HELD: Both applications to strike out the respective statements of case were dismissed. The court found that the nature of the terms of employment of the Claimant in this case, will turn on the construction of the several documents proffered by the parties. The court held that such a detailed review, including making inferences, was not appropriate on a strike out application and that the factual assertions should be ventilated at trial. The court also determined that the matter was not statute-barred finding that the action was a case of repeated breaches of recurring obligations and that each breach was capable of giving rise to a cause of action.

RULING

CARD-STUBBS J.

INTRODUCTION

- [1.] This ruling concerns two interlocutory applications before the Court.
- [2.] The Claimant's application was to strike out the filed Defence and for Judgement to be entered against the Defendants.
- [3.] The Defendants' application was to strike out the claim of the Claimant.
- [4.] For the reasons set out below, the Claimant's application is dismissed and the Defendants' application is dismissed.

BACKGROUND

- [5.] By specially-endorsed Writ of Summons, the Claimant sues in his capacity as a retired Public Officer for the payment of pension said to be due and owing.
- [6.] The Claimant alleges that he was at all material times a Public Officer of the Government employed by the Ministry of Education & Technical & Vocational Training as a Public School Teacher. This is admitted by the Defendant.
- [7.] It is common ground that the Claimant retired on July 8, 1997.
- [8.] The Claimant alleges, and the Defendants admit that on September 22, 2022, the Second Defendant issued a letter, by way of response to a letter from the attorney for the Claimant, "asserting that the Plaintiff is not entitled to Pension as he was not a Bahamian at the time of his retirement. The Defendants also admit to the Claimant's allegation this was followed up by email on September 28, 2022 "reiterating the Second Defendant's position that the Plaintiff was non-Bahamian and non-pensionable therefore not eligible for pension."

[9.] The Claimant's case is that he served in various educational capacities before retiring from in July 1997 and completed 41 consecutive years of service as a Public officer holding a pensionable office. The Claimant alleges that when he commenced employment in 1961, he was a believer of the British Colony of Jamaica and citizen of the United Kingdom and Colonies. The Claimant's case is that post-independence of the Commonwealth of The Bahamas on July 10, 1973, he was advised that he would have to apply for Bahamian Citizenship.

[10.] The Claimant's allegation is that he applied for citizenship "on or about 195/6 which was approved in February, 1997 with a Certificate being issued in December, 1997." The Claimant alleges that "upon reaching the retirement age of 60 the Plaintiff remained teaching in San Salvador until the a [sic] age 65 when he officially retired...in 2002." These allegations are denied by the Defendant.

[11.] The Claimant pleads at paragraph 12 of the Statement of Claim that "...citizenship has no bearing on the Plaintiff's entitlement to a pension other than being qualified as a public officer and pensionable having served the requisite time and not being under a contract. Further by virtue of the Constitution of the Commonwealth of The Bahamas Article 4(b) the Plaintiff became a citizen of the Commonwealth of The Bahamas on 9th July 1974 having been registered as a Belonger of the former colony of The Bahamas in 1963 under the British Nationality Act 1948 therefore the Plaintiff ought not to have applied for citizenship in 1995/6 when he did."

[12.] The allegations in paragraph 12 of the Statement of Claim are denied by the Defendants.

[13.] The Defendants' pleaded case by way of Defence is that "notwithstanding that the Claimant worked beyond the retirement age of 60 years, he applied for and was granted retirement at the age of 60 years. He also received a gratuity payment of \$38, 290 consequent on his retirement dated 8th July, 1997".

[14.] The Defendants' case is that "the Governor -General did not...order that the Claimant hold a "pensionable office" since the Governor-General awarded the Claimant a gratuity on his retirement 8th July 1977, rather than a pension; by order dated 30th September, 1997.

[15.] In summary, the Claimant's case is that he held a pensionable post and is entitled to the payment of pension. The Claimant argues that notwithstanding that

citizenship is irrelevant for the purpose of his entitlement to pension, he was in fact a Bahamian citizen before his retirement.

[16.] In summary, the Defendants' case is that the Claimant did not hold a "pensionable office" and was not entitled to a pension.

THE APPLICATIONS

The Claimant's application

[17.] The Claimant makes its application by Notice of Application filed herein on the 24th August 2023 to strike out the Defendants' Statement of Case and for judgment pursuant to Part 1 and 26 of the Supreme Court Civil Procedure Rules 2022, as amended ('CPR'). The grounds of the application are stated as:

- a. The breach continues pursuant to the Limitation Act Chapter 83 Section 12 (2)
- b. There is no Defence.

[18.] The Claimant's application is supported by the Affidavit of Benjamin Thomas, Claimant, sworn on 10th May, 2023 filed on 17th May 2023.

The Defendants' application

[19.] The Defendants' application by Notice of Application to strike out the Claimant's claim is made pursuant to Part 1 and 26 of the Supreme Court Civil Procedure Rules 2022, as amended ('CPR') and filed on 11th September 2023. The Defendants application is supported by the affidavit of Caprice Johnson sworn and 11th September 2023. The grounds of the application are stated as:

- a) The claim is frivolous and vexatious;
- b) The limitation period for the claim for the claimant expired over 15 years ago;
- c) There is no merit to the claim

ISSUES

[20.] The broad issue(s) which the Court must determine are:

1. On the Claimant's application, whether the Defence shows a reasonable ground for defending the claim and, if not, whether judgment should be entered for the Claimant.
2. On the Defendants' application, whether the Statement of Claim shows a reasonable ground for bringing the claim.
3. Whether the Claim is statute-barred

[21.] Each application seeks to strike out the other party's statement of case. Both applications address the limitation period for bringing the claim. Given the common areas of law, the applications will be considered together.

[22.] I will consider the first two issues together. The genesis of the applications whether the statements of case can presumptively show, or refute, the Claimant's entitlement to a pension.

ISSUES 1 AND 2 – Whether the Statement of Claim or the Defence should be struck out

The Claimant's submissions

[23.] The Claimant's case is that he is entitled to pension payments being a public officer appointed as a permanent and pensionable employee. The Claimant's case is that the Claimant became a citizen of The Bahamas on 10 July 1973 by virtue of Article 3 (3) of the Bahamas Constitution, having been a belonger of the British Colony of the Bahama Islands on 22 February 1967.

[24.] By the Affidavit of Benjamin Thomas, Claimant, the Claimant avers that he was hired as a Head Teacher by the British Colony of the Bahama Islands in September 1961. He claims that since his retirement he received a gratuity from the Public Service but has not received the pension to which he says he is entitled. The affidavit shows that by letter dated 11th March 1996, issued by the Permanent Secretary of the Ministry of Education and Training, the Claimant was advised to fill out a Pension form in order to "ensure the expeditious processing of your retirement benefit." The Claimant submits that this letter is evidence that the Defendants were aware that the Claimant was permanent and pensionable and thus entitled to pension.

[25.] The affidavit of Benjamin Thomas also shows that by letter dated 25th September 1996, issued by the Permanent Secretary of the Ministry of Education and Training, the Claimant was advised "your appointment is non-pensionable and therefore, you would only be eligible for the award of a gratuity at the end of your employment." That letter also stated, "However, should you receive your Certificate of Registration as a Citizen of The Bahamas before your sixtieth (60th) birthday consideration would be given for your appointment to the pensionable establishment".

[26.] The Claimant also proffers a letter dated 9th May 1974 which addressed the reassessment of the Claimant's salary as evidence that the Claimant was appointed to a permanent and pensionable position in the Public Service

[27.] Relying on the Constitution of The Bahamas, the Public Service Act, Pension Act and General Orders, the Claimant submits that citizenship is not a prerequisite for the entitlement to a pension under the Public Service Act, Pension Act or General Orders. The Claimant submits that the requirement for pension is that a Public Officer is permanently employed in a pensionable establishment in the public service, not hired under a contract and has been in continuous employment for five (5) years or more. The Claimant submits that the Claimant was employed for more than 41 years in a permanent and pensionable position.

[28.] The Claimant further submitted that even if citizenship were a prerequisite to receiving a pension, the Claimant became a citizen of The Bahamas on 10 July 1973 by virtue of Article 3 (3) of the Bahamas Constitution having been a belonger of the British Colony of the Bahama Islands on 22 February 1967.

[29.] The Claimant submits that he was employed in a permanent and pensionable position, relying on the letter of March 11, 1996. The Claimant also submits that citizenship is not a prerequisite for the entitlement to pension and that, in any event, the Claimant became a citizen on the independence of The Bahamas on July 10, 1973. On these grounds, the Claimant submits that there is no merit to the Defence and that it ought to be struck out, with judgment in favour of the Claimant.

Defendant's submissions

[30.] The Defendants submit that the Claimant has provided no evidence showing that the Claimant was employed on a permanent and pensionable basis. The Defendants argue that the Claimant has not provided the instrument appointing Claimant to a permanent and pensionable post within the public service.

[31.] The Defendants also argue that whether or not the Claimant became a Bahamian Citizen at the coming into effect of the Constitution of the Bahamas is not sufficient for a sustainable claim "since it is at the leisure of the Government of the day that a person might be hired to the public service. Further still, it is at the leisure of the Government of the day that a person hired to the public service is so hired on a permanent and pensionable basis. That is to say there is no entitlement, under statute or common law, that any person in the Bahamas must be hired on a permanent or pensionable basis regardless of status in the country."

[32.] The Defendants argue that the correspondence going from the Defendant to the Claimant concerning the Claimant's citizenship status did not "espouse a guarantee that the Claimant would be appointed to the pensionable establishment or indicate that he was entitled to it should he received the certificate. The letters only suggest that it would be possible, but not definite, that the Claimant be appointed to the pensionable establishment."

[33.] The Affidavit of Caprice Johnson filed September 11, 2023, in support of the Defendants' application to strike out the Claimant's statement of case, exhibits the instrument which appointed the Claimant to Head Teacher (Acting/Temporary) dated 4th September, 1961. The Defendants assert that the instrument represents a contractual agreement between the Claimant and the Public Service. The Defendants also exhibit what they describe as "several extensions to his contract".

[34.] The Defendants submit that "even if the court does not accept that the instrument is a contract which spells out that the employment was temporary and not permanent, at its lowest the instrument and the ensuing extensions throughout the years are irrefutable evidence that the employment of the Claimant was not to the permanent establishment."

LAW AND DISCUSSION

[35.] A Court has a discretion to strike out a statement of case pursuant to Rule 26.3 of the CPR which provides:

26.3 Sanctions – striking out statement of case.

- (1) In addition to any other power under these Rules, the Court may strike out a statement of case or part of a statement of case if it appears to the Court that —
 - (a) there has been a failure to comply with a rule, practice direction, order or direction given by the Court in the proceedings;
 - (b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;
 - (c) the statement of case or the part to be struck out is frivolous, vexatious, scandalous, an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings; or
 - (d) the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10.

- (2) Where —
- (a) the Court has struck out a claimant's statement of case;
 - (b) the claimant is ordered to pay costs to the defendant; and
 - (c) before those costs are paid, the claimant starts a similar claim against the same defendant based on substantially the same facts,
- the Court may on the application of the defendant stay the subsequent claim until the costs of the first claim have been paid.

[36.] In **Kevin Archer v Freeport Container Port and Another** [2002] 1 BHS J. No 28 *Hanna-Adderley J* stated:

“12 The power to strike out is a Draconian remedy which should be employed only in clear and obvious cases where it is possible to say at the interlocutory stage and before full discovery that a particular allegation was incapable of proof (per Allen, J in *Bettas Limited v Hong Kong and Shanghai Banking Corporation Limited and HSBC Bank Plc* SCCiv App No. 312 of 2013).

13. Guidance on how this rule should be applied is set out by Osadabey, JA in *Hamby v Hermitage Estates Ltd* SCCiv App No. 21 of 2008 and also by Auld, LJ in *Electra Private Equity Partners v KPMG Peat Marwick (a firm)* [2001] 1 BCLC 589. Osadabey, JA states in *Hamby*: “It is well settled that the jurisdiction to strike out is to be used sparingly and limited to plain and obvious cases where there is no need for a trial. There is no doubt that the exercise of that jurisdiction may deprive a party of the examination and cross examination of witnesses which can change the result of a case.” At page 613 of *Electra Private Equity Partners*, Auld LJ stated: “It is trite law that the power to strike out a claim under RSC Ord.18, r.19 or in the inherent jurisdiction of the Court should only be exercised in “plain and obvious” cases. That is particularly so where there are issues as to material primary facts and the inferences to be drawn from them, and when there has been no discovery or oral evidence. In such cases, as Mr. Aldous submitted, to succeed in an application to strike out, a defendant must show that there is no realistic possibility of the plaintiff establishing a cause of action consistently with his pleading and the possible facts of the matter when they are known. Certainly, a judge, on a strike-out application where the central issue is one of determination of a legal outcome by reference to as yet undetermined facts, should not attempt to try the case on the affidavits... There may be more scope for early summary judicial dismissal of a claim where the evidence relied on by the plaintiff can properly be characterised as “shadowy” or where “the story told in the pleadings is a myth... and has no substantial foundation”; see eg *Lawrance v Lord Norreys* (1890) 15 App Cas 210, per Lord Herschell at 219-220. **However, the court should proceed with great caution in exercising its power of strike-out on such a factual basis when all the facts are not known to it, when they and the legal principle(s) turning on them are complex and the law, as here, is in a state of development. It should only strike out a claim in a clear and**

obvious case. Thus, in *McDonald's Corporation v Steel* [1995] 3 All ER 615, [1995] EMLR 527, CA, Neill LJ, with whom Steyn and Peter Gibson LJ agreed, said, at 623 e-f of the former report, that the power to strike out was a Draconian remedy which should be employed only in clear and obvious cases where it was possible to say at the interlocutory stage and before full discovery that a particular allegation was incapable of proof.”

[Emphasis supplied]

[37.] I bear in mind that striking out a pleading or an indorsement is a draconian step. It is well-established that the discretion to strike out is to be exercised with caution and only in plain and obvious cases. Undoubtedly, there are cases that merit such a step. A statement of case may be struck out for not disclosing a reasonable ground for bringing a claim. This may be, for example, because there is no cause of action pleaded or because the pleaded cause of action is not viable or justiciable. A statement of case may be struck out for not disclosing a reasonable ground for defending a claim. This may be, for example, because the filed Defence does not dispute the claim or does not provide a defence known in law. A pleaded ground in a statement of case ought to be supported by the pleaded allegations of fact. If a court is required to undertake extensive fact-finding in considering an application to strike out a statement of case, then the matter is not suitable for such a pre-emptive determination.

[38.] The central issue in this case is whether the Claimant is entitled to a pension.

[39.] In this case, the Claimant claims an entitlement to pension based on the construction of a letter that the Claimant says is evidence of an appointment to a permanent and pensionable post. The Claimant also argues that he is a citizen of The Bahamas based on the construction of Article 3(3) of The Constitution. The Claimant makes this claim in answer to the Defendants' several communications requesting evidence of the Claimant's citizenship when responding to the Claimant's request to be paid a pension.

[40.] On the other hand, the Defendants invite the court to construe that the letters relied on by the Defendants could amount to nothing more than a contract and that therefore, for that reason, the Claimant was not entitled to a pension.

[41.] The Defendants argue that the burden of proof is on the Claimant to show an appointment to the permanent and pensionable establishment. I accept that this is so but the Defendants have not shown why the instrument proffered by the Claimant is not a suitable instrument of appointment as is asserted by the Claimant. Further, on the Defendants' own submissions, the letters of appointment exhibited

by them do not expressly provide that the Claimant was employed on a contract only.

[42.] The evidence, also, is that on more than one occasion, the Defendants asked the Claimant to provide evidence of his citizenship. The Claimant's response is that he was a citizen based on Article 3(3) of The Constitution and therefore a citizen on the date of his retirement. The suggestion is that the Defendants sought to withhold the pension payment pending the confirmation of the Claimant's citizenship status. The Defendants seek to explain such correspondence as mere enquiries and not any guarantee that upon provision of evidence of citizenship, the Claimant would be entitled to a pension.

[43.] In oral submissions, the Defendants concede that there is no evidence that the Claimant was told that he was not entitled to a pension. Their assertion is that he was never told that he was entitled to a pension.

[44.] The Defendants' submission is that the pension entitlement depends on the Claimant's status of employment – whether as a contract worker or whether permanent and pensionable. In this regard, the parties are *ad idem*.

[45.] It is my determination that the factual issue of whether the Claimant was employed on the permanent and pensionable establishment or by contract has to be based on the construction to be given to the documents before the court (and any other to be placed before the court that may result from a discovery process).

[46.] I consider that a court must proceed with caution where the facts are not plain and obvious. The parties in this case invite the court to draw certain inferences from the documents relied upon. The nature of the terms of employment of the Claimant in this case, will turn on the construction of the several documents proffered by the parties as viewed against the relevant legislation and general orders where applicable. It is my view that such a detailed review, including making inferences, is not appropriate on a strike out application.

[47.] Having regard to the cause of action pleaded and the allegations of fact, I find that the Statement of Claim discloses a reasonable ground for bringing the claim. Similarly, having regard to the nature of the defence pleaded and the allegations of fact, I find that the Defence discloses a reasonable ground for defending a claim. The conflicting factual assertions are to be ventilated at a trial. In my opinion, the facts in this case are not fairly resolved by a summary process - which is the nature of an application to strike out.

Issue 3 - Limitation Period

[48.] It is the Defendant's position that this action is statute-barred as the Claimant failed to commence action within a twelve (12) month period.

[49.] The Defendants submit that the Claimant is out of time in commencing the action pursuant to Section 12 of the Limitation Act. The Defendants argue that the Claimant had been informed that " he did not qualify to receive a pension being employed only on a contractual/ temporary basis", that there was no discussion or promissory undertakings that his matter would be reviewed subsequent to retirement and that the cause of action accrued at the time that the Claimant retired and received a gratuity as oppose [sic] to a pension. The Defendants submit that this "action cannot be classed as a continuing breach."

[50.] Section 12 of the **Limitation Act** provides:

"12. (1) Where any action, prosecution or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the provisions of subsection (2) shall have effect.

(2) The action, prosecution or proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or in the case of a continuance of injury or damage within twelve months next after the ceasing thereof."

[51.] It is the Claimant's position that the breach sustained is continuing and ceases on the day of death as pension is a benefit which continues during the lifetime of the recipient.

[52.] The Claimant cited the case of **Kevin Archer v Freeport Container Port and another** [2022] 1 BHS J. No. 28 and sought to distinguish it. In that case, the causes of action lay in negligence and breach of statutory duty as a result of storm and tornado activity on March 29, 2010. Writs of Summons were filed on March 5, 2013 and amended on March 3, 2014. The learned judge held that the actions were statute-barred by virtue of S.12 of the Limitation Act.

[53.] The Claimant also cited and distinguished the case of **Elecia Vernetta Outten and Edwin Burrows v The Attorney-General and another** [2019] 1 BHS J. No. 127. This case concerned the payment of a debt and the revival of the limitation period under 38 (4) of the Limitation Act. The Court struck out the Originating Summons on the ground that it was statute-barred.

[54.] Both parties have sought to distinguish those cases. I find that neither case is applicable on the limitation point to the extent that the cause of action in the case before me is distinguishable.

[55.] It is the Claimant's case that he is entitled to pension payments. This is said to be based on the employment relationship with the Defendants. The Defendants submit that the Claimant is "starkly out of time" and that the cause of action accrued when the Claimant retired and received a gratuity instead of a pension. The Defendants argue that once the Claimant learnt that he would not receive a pension, time started running. The Defendants' argument is that the Claimant's action accrued when he received a decision letter dated 30th September 1997 advising of the payment of gratuities.

[56.] The Claimant submits that the damage sustained is a continuing breach since the Claimant would be entitled to receipt of a pension once he is alive and until his death. The Claimant submits that the damage sustained is a continuing breach. The Claimant further submits that the Claimant is entitled to the payment of pension until his death and that the Claimant is still alive and so the damage is continuous. The Claimant argues that cases such as **Kevin Archer v Freeport Container Port and other** [2022] 1 BHS J. No. 28 and **Elecia Vernetta Outten and Edwin Burrows v The Attorney-General and another** [2019] 1 BHS J. No. 127 are distinguishable because the injury or damage to the Claimant is continuous. The Claimant submits that the Limitation Act does not apply.

[57.] Unlike the cause of action in negligence and breach of statutory duty in **Kevin Archer v Freeport Container Port and other** [2022] 1 BHS J. No. 28 or the attempted recovery of a debt in **Elecia Vernetta Outten and Edwin Burrows v The Attorney-General and another** [2019] 1 BHS J. No. 127, the cause of action in this suit involves a recurring breach. In a case such as this, where the suit is for pension payments which are periodic payments during a lifetime, then each time that a payment is withheld, it is a new breach giving rise to a new cause of action. While the breaches have their root in the employment relationship, the cause of action does not simply accrue on retirement. It accrues when the pension payment said to be due and payable is not paid.

[58.] I do not find this to be case of a continuing breach from a cause of action that accrued at the date of a first breach. It seems to me that this case is best analysed as a case of repeated breaches of recurring obligations. Each breach is a new breach of the employment terms and each breach is capable of giving rise to a cause of action. So, for example, if pension is payable on the first day of each month, a failure to pay on June 1 is a separate cause of action from a failure to pay on July 1. Any failure to pay when payment is due and payable gives rise to a distinct and separate cause of action. In those circumstances, where the pension payments are payable during the lifetime of the Claimant, the Claimant may sue on the recurring breaches that are within any limitation period set by legislation or contract.

[59.] In this case, I find that the cause of action is subsisting. It is my determination that the Claimant's action is not statute-barred.

CONCLUSION

[60.] The Claimant's application to strike out the Defence is dismissed. The Claimant's application for judgment is dismissed.

[61.] The Defendants' application to strike out the Statement of Claim is dismissed.

[62.] It is my view that, this is a matter that ought to go to trial. Given the regrettable delay in the issue of this determination, the court will direct an early hearing of a Case Management Conference. The parties are to furnish mutually convenient dates.

COSTS

[63.] The parties will bear their own costs.

ORDER

[64.] For the foregoing reasons, the order and directions of this Court are as follows.

IT IS HEREBY ORDERED THAT:

1. The Defendant's application to strike out the Claimant's Statement of Case is dismissed.
2. The Claimant's application to strike out the Defendant's Defence is dismissed. The application for Summary Judgement is dismissed.
3. Each party will bear their own costs.

Dated this 8th day of July 2025

A handwritten signature in black ink, appearing to read 'Carla D. Card-Stubbs', with a large, sweeping flourish underneath.

Carla D. Card-Stubbs
Justice