REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal Number: P-411 of 2018

Claim Number: CV2018-01887

IN THE MATTER OF THE JUDICIAL REVIEW ACT, NO. 60 OF 2000

AND

IN THE MATTER OF AN APPLICATION BY FAZAL ABDUL GHANY FOR LEAVE TO APPLY FOR JUDICIAL REVIEW PURSUANT TO THE PROVISIONS OF THE JUDICIAL REVIEW ACT 2000

BETWEEN

STRATEGIC SERVICES AGENCY Appellant/Defendant

AND

FAZAL ABDUL GHANY Respondent/Claimant

Panel:
Mr. Justice N. Bereaux J.A.
Mme. Justice J. Jones J.A.
Mme. Justice M. Dean-Armorer J.A.

Date of Delivery: September 4, 2020

Appearances:
Mr. Randall Hector, Ms. T. Vidale, Ms. Cherise Nixon and Mr. Ryan Grant attorneys-at-law for the Appellant
Mr. Dinesh Rambally and Mr. Stefan Ramkissoon, attorneys-at-law for the Respondent

JUDGMENT

Delivered by Mme. Justice M. Dean-Armorer J.A.

Introduction

1. The central issue in this appeal was whether the trial judge was plainly wrong in refusing to set aside an order for leave to apply for judicial review, on the ground of material non-disclosure.[1]

2. The Respondent, Fazal Ghany, applied, under Part 56.3 CPR, for leave to apply for judicial review. The impugned decision was that of the Appellant, the Strategic Services Agency (SSA), who had found him guilty of having provided false and misleading information at the time of his recruitment interview and in his testimony at High Court proceedings which he had instituted in 2017. The Trial Judge granted leave on May 29, 2018.

3. The Appellant then applied to the trial Judge to set aside the grant of leave to apply for judicial review. On November 8, 2018, the trial Judge dismissed the application to set aside. The Appellant then challenged the decision of the trial Judge, by Notice of Appeal filed on December 21, 2018.

[1] The Application to set aside leave was filed on September 12, 2018.

4. On 21st February, 2020, this Court heard submissions in support of and in opposition to the appeal. We delivered a unanimous ex tempore decision dismissing the appeal. Our reasons for so doing are set out below.

Factual Background[2]

5. In the year 2012, the Respondent, then a retired Corporal of Police applied to the Appellant for the position of Protection Officer.

6. The Respondent attended the recruitment interview, where he was questioned as to the reason for his early retirement from the police service. He explained that he was injured, while on duty and that he had been discharged as medically unfit. He also informed the interviewing panel that he had made unsuccessful attempts at obtaining compensation from the compensation committee under the ***Protective Services Compensation Act***[3] , and that he had had recourse to the High Court, the Court of Appeal and eventually the Privy Council.

7. The Respondent was successful at the recruitment interview and in February, 2015, he was offered a three year contract with the Appellant.

8. One month later, in March 2015, the Respondent was informed that that the Privy Council had allowed his appeal and had remitted his claim to the Compensation Committee for re-consideration.

[2]The facts were presented to the trial Judge by way of affidavits.[2]
[3] No. 22 of 1996

9. Two years went by and the Compensation Committee failed to reconsider the Respondent's claim, as directed by the Privy Council. The Respondent then filed High Court proceedings (the 2017 proceedings) in an effort to compel the Compensation Committee to comply with the direction of the Privy Council. On August 04, 2017, in a highly publicized decision, the High Court ruled in the Respondent's favour.

10. Four days later, on August 08, 2017, the Respondent was served with a letter dated August 07, 2017. The letter was captioned "Suspension pending Disciplinary investigation" and was signed by Ms. Ann Marie Alleyne, Director of Corporate Services of the Appellant. By her letter, Ms. Alleyne-Daly informed the Respondent of allegations that he had committed the following acts of indiscipline:

> *""i. Provided false and/or misleading background, financial and personal information to the Defendant at the time of his recruitment (fraudulent activity by commission);*
>
> *ii. Failed to provide relevant background, financial and personal information to the Defendant at the time of his recruitment (fraudulent activity by commission);*
>
> *iii. Gave false and/or misleading testimony on oath via affidavit dated the 24 July 2017 in the 2017 action (fraudulent activity by commission);*

iv. Failed to give relevant testimony on oath via affidavit dated 24 July 2017 in the 2017 action (fraudulent activity by omission)[4]

11. Ms. Alleyne-Daly set out the procedure which would be followed by the Appellant in the process of disciplinary action against the Respondent:

> *""Please read and ensure you understand our HR Procedural Guidelines on Disciplinary Action (See enclosed). Following the completion of our initial investigation, if it is demonstrated that there is a basis for the allegation and that disciplinary action appears necessary we will write to notify you and seek your response in writing. If there is no basis for the allegation and disciplinary action does not appear necessary, then we will write to confirm that your suspension is at an end without further action."*[5]

This letter was critical to the decision of the trial Judge. It will be referred to below as the letter of August, 2017

12. On December 21, 2017, Mr. Brian Daniels, Sergeant of Police with the Appellant, was appointed to investigate charges against the Respondent. Mr. Daniel interviewed the Respondent on two occasions and made a handwritten record of the interviews.
13. The Respondent heard nothing further of the investigation, until February 28, 2018, when he was served with a letter under the hand of Colonel George Robinson, Director of the

[4] See page 67 of the Record of Appeal, "F.G.2" annexed to the affidavit of FazalGhany
[5] Ibid

Appellant. The letter notified the Respondent that he had been found guilty of committing disciplinary offences and that his contract would not be renewed. The full terms of the letter are set out below:

> *"Dear Mr.Ghany*
>
> *Reference is made to the notice of suspension pending disciplinary investigation dated 7th August 2017.*
>
> *Kindly be advised that the investigation has been completed and you were found guilty of committing the disciplinary offences with which you were charged.*
>
> *Please note that all documents and statements, including your statement dated 21st and 23rd of February, 2018, were carefully considered.*
>
> *As a consequence, of the investigation being concluded proximate to the expiration of your employment contract no penalty will be imposed."*[6]

14. It was in respect of the finding of guilt, as communicated in the letter of February 28, 2018, that the Respondent instituted judicial review proceedings. The Clamant filed an ex parte application under Part 56.3(2) ***CPR*** seeking leave to apply for judicial review, on May 25, 2018 and was granted leave on May 29, 2018.

[6]See exhibit "F.G.2" page 70 of the Record of Appeal

The Decision of the Trial Judge

15. In her well-reasoned judgment, the trial Judge dismissed the Appellant's application to set aside the grant of leave. She directed her attention firstly to the August, 2017 letter and observed that the Appellant, had indicated to the Respondent that he would be subjected to a two stage disciplinary process. The trial judge then held that the Appellant had failed to adhere to that process. This finding was the foundation for the judge's decision on all the other arguments presented by the Appellant.

16. The trial Judge also considered and rejected the argument that there had been material non-disclosure by the Respondent, in his failure to annex the transcripts of the investigative interview. She found no material non-disclosure in the Respondent's omission to exhibit the hand written record of the interviews and held that these would only have been relevant if they had disclosed an adherence, on the part of the Appellant, to the two stage process.

17. The trial Judge likewise rejected the argument that the Respondent was at fault in failing to disclose the contents of the 2017 high court proceedings and disagreed that the Respondent's failure to follow the pre-action protocol procedure constituted material non-disclosure.

18. Finally, the trial Judge dismissed arguments on the ground of delay, holding that there was no issue of delay in the proceedings before her.

19. The Appellant, in their notice of appeal , canvassed the following broad issues:

i. Whether the trial judge was correct in finding that there was a two-stage process in the disciplinary procedure and whether the Appellant had failed to adhere to the stated process;

ii. Whether the Claimant, in his application for leave had failed to discharge his obligation to make full and fair disclosure, in respect of the interviews, information concerning the 2017 action, medical reports, the pre-action protocol procedure and his reason for delay.

iii. If so, whether such non-disclosure was sufficiently material to justify the discharge of the order for leave.

iv. Whether the Claimant's failure to follow the pre-action protocol procedure amounted to material non-disclosure.

Law

20. The power of the Court to set aside an order for leave to apply for judicial review should be used sparingly and should be reserved for circumstances where leave plainly should not have been given. See the Privy Council decision in ***Sharma v. Browne Antoine*** [2006] 69 WIR 379.

21. The principles which govern the requirement of full and fair disclosure in ex parte applications were set out by Ralph Gibson LJ in ***Brink's Mat v. Elcombe***[7]***.*** These principles are summarized below :

- It is the duty of the applicant is to make 'a full and fair disclosure of all the material facts';
- Material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers;
- The applicant must make proper inquiries before making the application, so that the duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries;
- the extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including:

  (a) the nature of the case which the applicant is making when he makes the application,

  (b) the order for which application is made and the probable effect of the order on the defendant

[7][1988] 3 All ER 188

(c) the degree of legitimate urgency and the time available for the making of inquiries

- If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains … an ex parte order without full disclosure is deprived of any advantage he may have derived by that breach of duty;
- Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.
- It is not for every omission that the injunction will be automatically discharged. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms.

Discussion

The Two-Step Process

22. Much of the Judge's findings were based on her assessment of the August, 2017 letter and her interpretation of the letter as prescribing a two stage process. For this reason, it was useful to consider the issue of the two stage process first.

23. It was the clear finding of the trial judge that the Appellant had undertaken to follow a two step process of discipline in respect of the Respondent. At paragraph 43 of her judgment, the trial judge had this to say:

> *"Based on the August, 2017 letter, the disciplinary procedure which the Defendant indicated to the Claimant that he was going to be subjected to a two-stage process".*[8]

24. Attorneys-at-law for the Appellant submitted that indeed there was a two step process, but not as envisioned by the trial judge. It was their argument the first step was the investigation, followed by the second step of disciplinary action. The Appellant relied on their *H.R. Procedural Guidelines on Disciplinary Action*.[9] They argued that according to the *H.R. Procedural Guidelines on Disciplinary Action*, the Appellant was authorized to suspend the employee with pay, pending investigation. If thereafter, the Appellant decided to terminate

[8] See paragraph 43 if the Judgment of the Trial Judge.
[9] H.R Procedural Guidelines on Disciplinary Action had been referred to and annexed to the 2017 letter.

the employee's contract, a meeting will be held with the employee where he would be given a letter of termination.

25. We disagreed with this submission for the Appellant. The opinion of the trial judge was supported by the plain meaning of the letter of August 17, 2017, where the Director, Ann-Marie Alleyne Daly wrote:

> *"Following the completion of our initial investigation, if it is demonstrated that there is a basis for the allegation and that disciplinary action appears necessary we will write to notify you…of the allegations made against you and seek your response in writing"*

26. We held that the trial Judge was correct in her finding that the letter of August, 2017 contemplated an investigation as the first stage. The second stage, as plainly contemplated in the letter, would be the Appellant affording the Respondent an opportunity to be heard, by providing written notification of the charges followed by a request for his response in writing.[10]

27. The grounds of appeal, which impugned the Judge's finding of a two-stage process, were therefore without merit.[11]

[10]See paragraph 43 of the judgment of the trial judge.
[11] See grounds D, E and F.

Material Non-Disclosure

28. It was our view that the Judge correctly identified the applicable test, by holding that the non-disclosure must be sufficiently material to discharge the order for leave.

29. The Judge exercised her discretion in holding there was no material non-disclosure of such importance as would justify setting aside the order for leave. We were of the view that she was correct in the exercise of her discretion for reasons which follow.

The Interviews

30. Attorneys-at-law for the Appellant argued that the Appellant was under a duty of candour and that pursuant to that duty, he ought to have exhibited the handwritten transcripts of the investigative interview to which the Respondent had been subjected. Attorneys-at – law contended further that transcripts would have made it obvious that the Respondent had been treated fairly.

31. The trial judge disagreed that the transcripts were material , and explained her reasoning in this way:

> *"Nowhere in the two statements …the investigator informed the Claimant that he was charged with any disciplinary offence"*

32. The trial judge then continued:

> *"in my opinion if that information was contained in any of the two statements, then it would have been material since the claimant would have been notified that*

there were charges against him and not allegations of offences which were being investigated"[12]

33. It was clear from the foregoing that the details of the investigative interview, devoid of information that the Claimant had been charged, were not regarded as material facts, by the trial judge.

34. According to Ralph Gibson LJ in ***Brink's Mat***[13], materiality of information is a matter for the judge. In order for this ground to succeed, it would have been necessary for us to determine that the exercise of her discretion was plainly wrong.

35. It was our view that the trial judge was not plainly wrong in holding that the detailed hand written transcript of a mere investigative interview was not material. The clear underlying reason was that the Respondent, in his application for leave to apply for judicial review, had provided a summary of the interviews, portraying them as the first step in the investigative process. His summary was accurate. He would have been faulted for material non-disclosure only if he had been notified in the course of the interview, that his case had moved from allegations to charge and he had chosen to conceal such notification from the court.

36. Even if we are wrong so holding, we considered the Respondent's reason for failing to annex the hand-written transcripts.

[12] See paragraph 46 of the judgment of the Trial Judge
[13] [1988] 3 All ER 188

37. The Respondent alluded to the interviews at paragraph 15 of his affidavit in support of the application for leave. He deposed as follows:

> *"I received a telephone call from Mr. Daniels who stated that he was appointed investigator into this matter. Thereafter there were two (2) interviews conducted at the Intended Defendant's head office. At both interviews I requested better particulars…"*

38. The Respondent did not however annex the hand written statements which had been recorded by Mr. Daniels in the course of the two interviews. Mr. Ghany explained that he did not and could not exhibit the hand-written statements since they had not been given to him.[14]

39. The Respondent had no obligation to disclose documents which were not in his possession. Although he was under an obligation, in-keeping with his duty of candour, to make enquiries and to disclose any facts, which he had discovered through those enquiries, he was not required to embark on extensive and time-consuming enquiries. Whether enquiries were necessary depended on all the circumstances of the case including the degree of legitimate urgency and the time available for making enquiries.[15]

40. In the context of these proceedings, the time available for making enquiries would have been limited by the three month deadline for commencing judicial review applications. There was therefore no breach, on the part of the Respondent, of his duty of candour, in

[14] See paragraph 5 of the reply affidavit of the Respondent
[15] See Brinks Mat where his Lordship referenced the principle at paragraph iv (c)

failing to exhibit the handwritten transcripts. There was no material non-disclosure in this regard.

The 2017 Action

41. The Appellant contended that the Respondent had failed to disclose the contents of the 2017 action and his basis for seeking an urgent hearing fit for the Court vacation and that this failure constituted material non-disclosure.

42. We found no fault with the trial Judge's decision that this was not material to the issue before her. At the leave hearing, done frequently in chambers, the issue is whether the applicant has demonstrated an arguable ground for judicial review with a reasonable prospect of success. See ***Sharma v. Browne Antoine.*** It is trite that an applicant at the leave stage has to surmount a low threshold.

43. The issue before the rial Judge, when she heard the application for leave, was whether, having regard to the August, 2017 letter, the interviews and the final letter of May 25, 2017, the Claimant demonstrated that he had been treated unfairly. The details of the 2017 action, which may eventually operate to prove guilt on the part of the Respondent, were irrelevant to the issue as to whether the Claimant had an arguable case. The trial Judge was correct in her finding that there was no material non-disclosure in respect of the 2017 Action.

Pre-action Protocol Procedure

44. In respect of the pre-action protocol procedure, the Appellant advanced a compound argument, that is to say that the Respondent failed to adhere to the pre-action protocol procedure and had he so done, he would have recovered the statements which were recorded in the two interviews.

45. The trial Judge expressed the view that the pre-action protocol procedure is not mandatory. In support, she cited and relied on Appendix D of Practice Directions of CPR.

46. The trial judge was correct in her decision that the pre-action protocol procedure was not mandatory. The Respondent's failure to implement the pre-action protocol procedure could not be regarded as having resulted in material non-disclosure, since there was no certainty that the use of the pre-action procedure would have enabled him to retrieve the documents in time, before instituting judicial review proceedings or at all.

Delay

47. By section 11 of the ***Judicial Review Act***[16], applications for judicial review are required to be made promptly and in any event within three months from the date when the grounds of the application first arose.

[16] Ch 7:08

48. The trial Judge, dismissing the Appellant's argument on the ground of delay, noted that the Respondent had filed his application within the three months as stipulated by section 11 of the Act.

49. It was clear that the ground upon which the Claimant instituted proceedings arose on February 28, 2018. The application for leave was filed on May 25, 2018, safely within the stipulated time.

50. Accordingly, there was no delay and the trial Judge was correct in dismissing this aspect of the Appellant's application.

The Medical Reports

51. In the course of the grant of leave for judicial review, the Appellant contended that they were entitled to the medical reports of Dr. Stephen Ramroop and Dr. Clem Ragoobar. The trial Judge refused this application. She observed that, in the course of the interview , which led to the finding of guilt , the Respondent had been questioned by Mr. Daniels as to the medical reports. The Appellant therefore had adequate information on the medical reports and their disclosure was unnecessary.

Conclusion

52. For all of the above reasons, there was no merit in the appeal, which we dismissed on February 21, 2020.

I have read the judgment of Dean-Armorer JA and I agree with it.

N. Bereaux

Justice of Appeal

I have read the judgment of Dean-Armorer JA and I agree with it.

J. Jones

Justice of Appeal

/s/ M. Dean-Armorer
Justice of Appeal