



**COURT OF APPEAL
TURKS AND CAICOS ISLANDS
CIVIL**

CL AP No. 16 of 2014



BETWEEN:

CAROL DURHAM

APPELLANT

AND

THE ATTORNEY GENERAL

RESPONDENT

BEFORE:

Sir Elliott Mottley,	President
The Honourable Mr. Justice Stollmeyer,	Justice of Appeal
The Honourable Mr Justice Adderley	Justice of Appeal

APPEARANCES:

Mr Noel Skippings for the Appellant
Ms Clemar Hippolyte for the Respondent

HEARD:15 & 24 September

DELIVERED:02 October 2020

JUDGMENT

Stollmeyer JA.

[1] This is an appeal against the judgment of Goldsborough CJ ("The Trial Judge") of 06 March 2014 dismissing the Appellant's ("Mrs Durham") claim against the Respondent ("the Attorney

General") for payment to her in respect of 187 days of accumulated vacation leave. On 24 September 2020 we allowed the appeal and ordered that she be paid 116 days accumulated vacation leave. This is the written judgment.

[2] The Grounds of Appeal are three fold. They are that:

1. the decision of the Trial Judge was against the law and the facts;
2. equity prevails when in conflict with the law;
3. Mrs Durham had a legitimate expectation of receiving the payment claimed.

[3] At the outset it must be noted that the hearing of this appeal suffered from the deficiencies of the Record filed on behalf of Mrs Durham. There was no transcript of the oral evidence taken at trial, nor any of the Trial Judge's notes of that evidence. It omitted several of the affidavits filed and apparently used at the trial, and did not include the defence filed on behalf of the Attorney General. It appears that this state of affairs only came to the attention of Counsel for the Attorney General perhaps a week before the hearing despite the appeal having been before the Court on several occasions, and arrangements were then made to file a second Bundle by way of supplementing the Record. Regrettably, this bundle did not come to the attention of the Court until hearing of the appeal had begun. In the event, Counsel agreed that the hearing should proceed without the use of this second bundle since the Court had not had the opportunity to consider its contents (which still did not include a transcript or notes of evidence). The hearing then proceeded on that unsatisfactory basis, but this did not affect the outcome of the appeal since its determination turned on issues of law and not fact.

[4] Mr Skippings for Mrs Durham conceded that the Trial Judge's findings of fact could not be successfully set aside. He also conceded that the principles of legitimate expectation arise in public law, principally judicial review, and was unable to show how they might be imported into private law and since his client's claim was – and is – firmly founded in the latter by way of a writ action under Order 6 rule 1 of the Civil Rules. He also conceded that he was unable to show how the principles of equity were applicable to the case. He did not pursue these Grounds. He also came to agree that the appeal turned on the interpretation of the General Orders 1998 of the Turks and Caicos Islands Public Service ("the General Orders") which came into force on 16 February 1998, and on Orders 8.1.17 and 8.1.21 in particular, as well as to a Circular of 04 March 2011 issued by The Chief Executive's Office relative to "Essential pension and payroll changes" ("the Circular")

Background

[5] In essence, Mrs Durham was employed by the Turks and Caicos Government for a period of 38 years before retiring as the Chief Government Printer on 12 May 2011. During those 38

years she did not take all the annual vacation leave to which she was entitled due at least partly to the exigencies of the service. On more than one occasion her application for leave was refused on this basis¹.

[6] She did not keep a record of the leave she had either taken or accrued and relied on the calculation of Mrs Susan Malcolm, Permanent Secretary, Office of Public Service Management, who in a memo to the Accountant General of 27 May 2011 said: *"She has in hand 247 working days leave. I should be grateful if you would calculate her benefits for payment."* Mrs Durham relies on this memo to support her claim to payment for the 247 days.

[7] Mrs Durham's complaint is founded on this calculation and on previous payments having been made to other members of staff of all their accrued leave. She says that these two factors give rise to a legitimate expectation of being paid. As has been said, however, that ground was not pursued.

[8] The Chief Finance Officer, with whom there is no contention that the final decision rested, however, decided that payment for only 60 days should be made and authorised payment of same. There is no evidence to show how that decision was arrived at. Mrs Durham therefore claims payment in respect of the 187 days for which she was not paid.

[9] It is helpful here to have regard to the General Orders on which Mrs Durham relies:

8.1.17

"At least one-half of annual leave must be taken in the year in which it is earned and any balance up to a maximum of thirty days may be accumulated. After the maximum accumulation is reached annual leave not taken will be forfeited. An Officer who on the date of coming into force of these Orders had annual leave in excess of thirty days' accumulation will be required to take such excess in instalments within five years. Any remaining part of that unused accumulation will be held over until retirement. The Chief Secretary may in exceptional circumstances where an Officer has been prevented by the exigencies of the public Service from taking annual leave, direct that the leave may be accumulated and not count towards the limit of thirty days imposed above."

¹ In her affidavit of 29 September 2012 at paragraph 7 she says: "My leave was accumulated partly because those responsible refused it when it was due, telling me that I could not take it because there was no one in my office too perform my duties had I gone on leave"

8.1.21

"An Officer applying for leave with the intention of retiring may be granted immediately prior to the effective date of his or her retirement on pension, the accumulated leave for which he or she may be eligible together with full pay leave accumulated in accordance with Order 8.1.18, provided that without the authority of the Chief Secretary no Officer shall be granted a total period of more than twelve months' leave prior to his or her retirement."

[10] Apart from the above we were referred to the Circular, the relevant parts of which read as follows:

"No more than 30 days accumulated leave will be paid when an employee leaves the service.

...

A temporary concession will be applied allowing payment for up to 60 days leave where this is supported by proper records. This will be reduced by 2 ½ days each month until March 2012 when the 30 day rule will be strictly enforced."

[11] This capped the amount of vacation leave that civil servants can accumulate and be paid for at 30 days when leaving the service, with a possible payment for a further 30 days. It replaced the previous twelve month limit under General Order 8.1.21.

Analysis

[12] The outcome of this appeal turns to a great extent on the interpretation of general Order 8.1.17. Ms Hippolyte submits that the effect of the second sentence is to impose an obligation on the employee to take whatever leave had accumulated as at 16 February 1998 within five years of that date, and in default lose any leave not taken at the end of that five year period. This, she submits, flows from the obligation to take the leave. Further, she submits, any part of the accumulated leave not taken within that period would be forfeit. I agree with that submission. She also submits that if none of the leave accumulated as at February 1998 had been taken then it would all be forfeit.

[13] That latter interpretation, however, does not accord with the provisions of the third sentence which is clear: *"Any remaining part of that unused accumulation will be held over until retirement."* First, there is no limit on the amount of unused leave that will be available for taking at retirement. Second, if there is no limit on the amount of unused leave that can be taken, then it stands to reason that if none of the accumulated leave has been taken then all of it can be taken at retirement.

[14] It emerged, and was agreed, during the course of the hearing before us that as at February 1998 when the General Orders came into force, Mrs Durham had accumulated 116 days of leave and that she had taken none of it within the stipulated five year period. The right to that leave had vested in her as at that date and the circular of 04 March 2011, which could only be prospective, could not deprive her of it.

[15] There is then the issue of how many days of leave had accumulated between February 1998 and 12 May 2011 as a consequence of Mrs Durham not being allowed to proceed on leave. As has been said at paragraphs [5]-[6] above, she acknowledges that not all of the 247 days were as a result of being refused permission to go on leave. The number of those days, we are given to understand, is in contention, but it is not in issue that she would be entitled to be paid only for those days.

[16] There was apparently no evidence before the Trial Judge which would enable him to arrive at a finding on this. At paragraph 25. of his judgment (erroneously numbered 24.) he refers to her statement that her:

"leave was accumulated partly because those responsible refused it when it was due, telling me that I could not take it because there was no one in my office too perform my duties had I gone on leave"

and goes on to say in the following paragraph, correctly, that this

does not account for that leave which did not accumulate because those responsible had refused it. Some leave, and there is no evidence of how much available, will have accumulated because the Plaintiff herself chose not to ask or herself chose to say and complete that which she knew had to be done."

[17] In the same way, that evidence was obviously not before us and we are therefore not able to come to any conclusion as to the number of days of vacation

leave that had accumulated because Mrs Durham was refused permission to go on leave.

[18] Having set out certain findings of fact at paragraphs 22. and following of his judgment, the Trial Judge continued at the paragraph numbered 26.:

"It is most likely that this and similar factors led to the decision of the Chief Finance Officer (at a time when the Chief Secretary position had ceased to exist) to agree to the payment for 60 days accrued leave as opposed to 30 days."

[19] While it is possible that the Chief Finance Officer may have based his decision on the provisions of the Circular, there is no evidence of this, nor does the Trial Judge set out what the other similar factors might have been. Consequently, this conclusion is speculative and the Trial Judge fell into error.

[20] There being no evidence as to how the Chief Finance Officer came to the decision that Mrs Durham was to be paid for 60 days, however, it is difficult to say that it was incorrect and we are unable to interfere with that decision.

[21] The Trial Judge also fell into error when he failed to examine the provisions of the General Orders and the Circular. Instead, he dealt with, and decided, the issues of estoppel and legitimate expectation, basing his decision on those issues. The issue of estoppel was not part of Mrs Durham's pleaded case and legitimate expectation is not a principle of law in private law matters. Mr Skippings, correctly, did not pursue either of these grounds before us.

[22] What is clear in all this, however, is that Mrs Durham is entitled to be paid for the 116 days vacation leave accumulated as at February 1998. As has been said, that right had vested in her at the date the General Orders 1998 came into force and the policy change, as Ms Hippolyte referred to it, set out in the Circular, could not take it away.

Disposition

[23] In the circumstances, the appeal is allowed.

[24] The Appellant is to be paid for an additional 116 days accumulated vacation leave.

[25] There is no evidence before us which would allow that calculation to be made. Consequently, if the parties do not agree the amount to be paid by 30 October 2020, the matter is remitted to the Supreme Court for assessment by a Judge.

[26] The Appellant is also to be paid her costs of the appeal, and of the costs of the assessment should it take place.

/s/Stollmeyer JA

I Agree



/s/Sir Elliott Mottley

I Agree

/s/ Adderley JA