

Plaintiff's application to stay the proceedings brought under the section 7(1)(a) Human rights (Bailiwick of Guernsey) Law, 2000, and consideration as to the duplicative nature of proceedings.

[2021]GRC054

**IN THE ROYAL COURT OF GUERNSEY
(CIVIL DIVISION)**

Between:

ROBERT VARLEY

Plaintiff

and

**CONVENOR OF THE EMPLOYMENT AND DISCRIMINATION
PANEL**

**First
Defendant**

and

THE STATES OF GUERNSEY

**Second
Defendant**

Application by Plaintiff to stay Proceedings

Case heard on: 6th October, 2021

Decision handed down on: 12th October, 2021

Judgment handed down: 11th November, 2021

Before: Catherine Maureen Fooks, Judge of the Royal Court

The Plaintiff in person

Counsel for the First Defendant: Advocate E. Bamber

Counsel for the Second Defendant: Advocate P. M. Grainge

Legislation, texts and cases referred to in Decision:

The Human Rights (Bailiwick of Guernsey) Law 2000

The Royal Court Civil Rules, 2007

The White Book

Slough Estates Limited v Slough BC 1968 Ch 299

G v G [2005–06 GLR Note 7]

Introduction

1. This judgment, which is ex tempore, concerns the application by the Plaintiff to stay the proceedings which he has brought against the Defendants dated 11th May 2021 under section 7 (1)(a) of the Human Rights (Bailiwick of Guernsey) Law 2000 (“HRL”) (“the Proceedings”). The Proceedings arise out of a claim for unfair dismissal and sex discrimination brought by a complainant against the former employer of both the Plaintiff and that complainant in the Employment and Discrimination Tribunal. The determination of that claim resulted in a decision made by The Employment and Discrimination Panel (“the Panel”) dated 5th October 2020 and to a document containing extended reasons for the decision (“Extended Reasons”).

The Plaintiff claims that the inclusion in the Extended Reasons of personal information about him and the publication of those Extended Reasons by the Second Defendant on its website on more than one occasion constitute breaches of his Article 8 rights.

2. In the Proceedings, the Plaintiff seeks various forms of relief including, at paragraph 2, “an interim order staying these proceedings pending the conclusion of any Judicial Review brought by the Plaintiff in respect of substantially the same matters”. In terms of final relief, he seeks orders which will ensure that there is no future publication of the Extended Reasons and he seeks damages under various heads.
3. At the directions hearing on 14th May 2021 the Defendants indicated that they would be making an application to strike out the claims and their applications so to do are both dated 28th May 2021 (“the Strikeout Applications”) and were, subsequent to that directions hearing, tabled for hearing on 6th October 2021. On 13th May 2021 the Plaintiff said that he was not seeking the interim stay as it was unclear whether the other proceedings (Judicial Review) would be going ahead. As at 14th May 2021, the Plaintiff’s Application for leave to institute Judicial Review had been refused by LB Roberts on 13th April 2021. His application for leave to appeal that refusal was pending before the CA (“CA”) (“the Appeal”). Leave was subsequently granted on 2nd June 2021. It appears that there was no further discussion between the parties after 14th June 2021 about the application for the stay. Skeleton arguments in support of the Strikeout Applications were filed by the First Defendant dated 4th June 2021 and by the second Defendant on 26th May 2021. The Plaintiff filed his response on 26th May 2021.
4. I note and take account of the fact that the Plaintiff is unrepresented. Advocate Grainge made the point that he is a qualified lawyer, but I rejected that observation as a basis for treating him any differently from any other unrepresented party. In my judgment, parties are either represented or they are not, and the court cannot get involved in a qualitative assessment process to distinguish between unrepresented parties who happen to have some legal qualifications and those who do not.
5. In the course of the hearing Advocate Grainge took the lead for the two Defendants with Advocate Bamber largely adopting the arguments made by Advocate Grainge.
6. At the end of his response to the Defendants’ strike out skeleton arguments he said: “*the plaintiff acknowledges that if (and to the extent that) his appeal regarding leave for judicial review is successful this case may indeed become otiose and he would withdrawal part or all of these claims as appropriate. **The plaintiff requests a stay of these proceedings pending the outcome of that appeal.***” (my emphasis).
7. In the week before the hearing set for the strikeout applications, I was asked to list a preliminary hearing to deal with an argument between the parties over proposed late filing by the Plaintiff of a revised response and some authorities. I set that preliminary hearing down for Monday 4th October 2021. When I read the papers in preparation for that hearing and the Strikeout Applications, I noticed the request by the Plaintiff for a stay and raised it with the parties at the preliminary hearing. I wanted to establish whether the Plaintiff was seeking a stay as it seemed to me logical that I should consider dealing with that before the Strikeout Applications and I wanted to establish the position of the Defendants. After a discussion in which it was clear to me that the Plaintiff did wish to progress his application for stay, I indicated that we should return to the matter on 6th October.
8. Accordingly, at the start of that hearing I raised again the issue of the stay. The Defendants’ counsel both submitted that it was not clear that the stay would be heard but nonetheless the stay application was made by the Plaintiff and arguments were advanced by both counsel. I invited counsel and Mr Varley to consider whether they would wish to have more time before I made a decision but they all felt that they had had ample opportunity to put their points across.

9. I reserved judgment on the basis that I would endeavour to make a decision by 4th October because I was being urged by all parties to avoid any delay in dealing with the Strikeout Applications in view of the fact that they were all ready to deal with those applications. Following the court hearing I considered it appropriate to seek sight of the papers before the CA as there was an issue with potential overlap between these proceedings and the proceedings before the CA and I was provided with the Appellant's grounds of appeal and the judgment of Jonathan Crow QC sitting as a single judge in which leave to appeal was granted ("the CA judgment").

A brief Chronology

10. I set out a few of the key dates but not all of them. LB Roberts sets out a very full chronology in his judgment on the application for leave for Judicial Review albeit that the Plaintiff takes issue with 1 or 2 of his chronology entries:-

3rd March 2021 Judicial Review commenced;

12th March 2021 Bailiff ordered Reasons to be taken down and not re-published pending outcome of Judicial Review;

13th April 2021 leave for Judicial Review refused by LB Roberts and Bailiff's order extended for 1 month;

22nd April 2021 Application to CA for leave to appeal;

11th May 2021 Rule 90 application by the Plaintiff to commence the Proceedings – granted;

11th May 2021 the Proceedings commenced;

13th May expiry of Bailiff's order but agreement not to re-publish until the CA had decided on the leave application;

14th May 2021 First tabling in the Royal Court of the Proceedings;

2nd June 2021 CA granted leave to appeal the refusal of leave for Judicial Review.

The Proceedings

11. The Plaintiff's action against the Defendants dated 11th May 2021 contains claims made pursuant to section 7(1)(a) of the HRL.
12. Section 7(1)(a) enables a person who claims that a public authority has acted in a way which is made unlawful by section 6 (1) to "*bring proceedings against the authority under this law in the appropriate court or tribunal....*".
13. Section 6 "*provides that it is unlawful for a public authority to act in a way which is incompatible with a convention right*". Public authority is defined in section 6 of the HRL and includes a court or tribunal.
14. Section 8 sets out the relief for remedies available where the court finds but that there has been an unlawful act of a public authority.
15. Section 9 limits proceedings under section 7(1)(a) in respect of acts which are "judicial acts". Subsection (1) of section 9 provides that "proceedings under section 7(1)(a) in respect of a judicial act may be brought only (my emphasis) – (a) by exercising a right of appeal, or (b) in

such other forum as may be prescribed by rules of court. A “Judicial Act” is defined in section 9 as a “judicial act of a court and includes an act done on the instructions, or on behalf, of a judge”. “Court” is specifically defined as including a tribunal.

16. Subsection 9(2) “provides that in proceedings under this law in respect of a judicial act, damages may not be awarded otherwise than to compensate a person to the extent required by article 5(5) of the Convention”.

The Strikeout Applications

17. The Strikeout Applications made by the Defendants are the next procedural step in the Proceedings.
18. The Defendants’ first Argument is that the content of the Extended Reasons issued by the Tribunal is a judicial act as defined under section 9 of HRL and section 9(1) therefore applies which prohibits proceedings under section 7(1)(a) of HRL except when brought by exercising a right of appeal or in accordance with rules of court. As the Proceedings do not constitute an appeal and there are no rules of court, the Defendants assert that the Proceedings should be struck out. Ancillary to this argument, the Defendants assert that the relief claimed in the Proceedings is not available to the Plaintiff by virtue of section 9(2) of HRL.
19. The Defendants’ second argument is that the Proceedings are an abuse of process because they are a duplication of the Judicial Review.
20. Counsel for the Defendants urged me to deal with the Strikeout Applications particularly insofar as they concern the construction of sections 7 and 9 of HRL which they asserted are distinct from the issues in the Appeal.
21. It is important to note that there is agreement to stay the Proceedings if the Strikeout Applications are unsuccessful so it is only a stay now which would prevent the hearing of the Strikeout Applications which is contested.

The Plaintiff’s Application for Judicial Review and the Appeal

22. The Plaintiff seeks a stay on the basis that he is awaiting the hearing of his appeal against the refusal of leave to institute his Judicial Review and that will determine the future of the Proceedings, from his perspective. As this is an ex tempore judgment, I will not set out in any detail the substance of the Judicial Review, the grounds of appeal or the basis on which the CA has granted leave to appeal. All of those matters are succinctly set out in the Appeal Judgment.
23. The Plaintiff sought leave from the Royal Court to pursue (1) the decision by the First Defendant as set out in the Extended Reasons and (2) the decision of the Second Respondent to publish the Extended Reasons on its website. The Plaintiff seeks orders which will permanently prevent any re-publication of the Extended Reasons and he also seeks damages.
24. There is no doubt that the subject matter of the Proceedings and the Judicial Review is substantially the same. The parties are the same, the facts are the same, the alleged wrongs are the same and there is an overlap in the relief sought. In the Judicial Review, the relief sought is a range of orders to prevent re-publication of the parts of the Extended Reasons which concern the Plaintiff, liquidated damages as respects the costs of dealing with a complaint to SRA which the Plaintiff alleges flowed from the decision/Extended Reasons, damages for harm to the Plaintiff’s reputation from publication/re-publication and such further relief as the Court deems just. The relief sought in the Proceedings is similar but there are claims for specific damages to cover loss of earnings, just satisfaction for loss of future earnings and emotional damage.

25. The principal ground upon which the learned LB refused to leave for Judicial Review was that of delay which is not directly relevant to the issue I have to determine.
26. There is one specific area to be covered by the Appeal which I consider constitutes a particular overlap with the Proceedings. Paragraph 17 of the Appeal Judgment reads thus: *“As to the Second Defendant’s decision to publish the Extended Reasons in October 2020, Mr Varley says that [LB Roberts] was wrong to regard the Second [Defendant] as acting merely as a ‘conduit’ in relation to that publication. His principal argument is that [LB Roberts] failed to take into account the fact that the Second [Defendant] had a discretion whether to publish, and that in exercising that discretion it was bound by section 6 of [HRL] to act compatibly with Convention rights.”*
27. I also note that at paragraph 19 of the Appeal Judgment there is reference to damages under Section 8. The CA will, therefore, be considering what damages may be ordered in a Judicial Review application.

The Power to Stay Proceedings

28. The Plaintiff did not make his application for a stay under any specific provision. Rule 50(2)(c) of the Royal Court Civil Rules, 2007 gives the Court the following power *“the Court may stay the whole or part of any proceedings or judgment generally or until a specified date or event”*. This is a wide discretionary power identical to the power afforded to the English Court under CPR 3.1 (2)(f) and is part of the general case management powers of the Court.
29. I was taken to paras 9A-176 of *The White Book* which concerns the English Court’s inherent power to order a stay (which this Court also has), to para 9A-178ss which is the commentary on Rule 3.1 (2)(f) and specifically to para 9A-183 which deals with concurrent proceedings.
30. I was also given the case of *Slough Estates Limited v Slough BC* 1968 Ch 299 which is described as an example of a situation where a stay might be appropriate and is the subject of the following commentary in paragraph 9A-183 of *The White Book*: *“the advantages to be gained in avoiding a duplication of proceedings are obvious; they include the avoidance of unnecessary costs and delays another party being vexed more than once with in effect, the same claim.”* That case was cited by LB Finch in the Royal Court case of *G v G* [2005–06 GLR Note 7].
31. There was nothing provided to me on the specific points arising in this case but it can be seen from the authorities that the discretion is broad and fact-specific. The principles upon which a court will grant a stay particularly a stay which is permanent or which may become permanent are not that far removed from the principles upon which the court will strike out an action on the basis of abuse of process. In both cases the Court is seeking to prevent Defendants (who are the usual applicants for stays and strikeouts) from being unduly vexed by proceedings which, by reason of duplication or otherwise, are an abuse of process. In the circumstances of this case, I must consider the extent of overlap between the two sets of proceedings.

The Parties’ Submissions on the Stay Application

32. The Plaintiff seeks a stay of the Proceedings generally as he submits that it makes no sense to waste any more time and money on the Proceedings pending the outcome of the Judicial Review. The Defendants object to the stay now as they want their Strikeout Applications determined so that the Proceedings are brought to an end now rather than remaining live.
33. The issue as to whether or not the Proceedings were duplicative (and should be viewed as concurrent proceedings) was afforded considerable importance in the submissions. Although

the Plaintiff's application for a stay describes the Proceedings and the other proceedings (the Judicial Review) as being in respect of substantially the same matters.

34. The Plaintiff submitted that the Proceedings were not duplicative now as the Judicial Review is dead. The Proceedings would become duplicative were the CA to grant leave for Judicial Review. Counsel for the Defendants did not agree with his analysis. In their view the Judicial Review is live as it is subject to appeal so there are two live sets of proceedings now. When suggested by Advocate Grainge that he is having two bites at the cherry, the Plaintiff denied having had any bites at all as none of his claims has been determined.
35. The Plaintiff also said, more than once, that he would not pursue the Proceedings were he to be granted leave for Judicial Review, regardless of the outcome. He did qualify that, at times, by adding that he would not want to abandon the Proceedings (or at least the damages claim as against the Second Defendant), were the CA to rule that damages cannot be awarded in the Judicial Review.
36. The Plaintiff accepted that there is duplication between his claim and the proceedings which are the subject of the Appeal in terms of subject matter and relief sought. He disputed that the claim was vexatious or an abuse of process but, surprisingly, also said that he was "peculiarly" in a position where he is saying that to proceed with the strikeout now or to proceed with the claim now, given that the same/similar case is before CA, would be vexatious. He could see the irony in that. He went on to ask for the stay until the outcome of the proceedings in CA was known and only revisit the Proceedings if the proceedings subject to the Appeal fall away.
37. The Plaintiff raised the burden the Proceedings places upon him. In his view hearing the Strikeout Applications benefit no one. Advocate Grainge disagreed, urging me that it would be efficient case management to get to the bottom of whether or not the Plaintiff has lawful claims. In her submission it would be wrong for the Court to hold in reserve something to which the Plaintiff is not entitled and that the Defendants do not want a second set of Proceedings looming if there is no legal basis for them. This is especially true of the challenge to the cause of action based on sections 7(1) (a) and 9(1). There is either a claim or there is not, she submitted.
38. In the course of the hearing there were references to the possibility that my hearing the Strikeout Applications would lead to me "second guessing" the CA and time was spent on the similarities and differences between the Proceedings and the Appeal. The Plaintiff struggled to accept, but did eventually accept, the proposition that the Proceedings are confined to section 7(1)(a) and that, as the CA is not concerned with a claim under that section but with Judicial Review, there is a discrete point to be considered in the Proceedings in relation to sections 7(1)(a) and 9(1). It was common ground that the Judicial Review falls under s7(1)(b) of the HRL.
39. Advocate Grainge submitted that fact that CA was considering the availability of damages was less distinct from the issues in the Proceedings and that the lack of clarity about the availability of damages in Judicial Review could invoke the exceptional reasons proviso should I be satisfied, in principle, that there were grounds to strike out. The Plaintiff submitted that the damages sought in the Judicial Review were different from those sought in the Proceedings.
40. The Plaintiff submitted that there is overlap between the Judicial Review and the Proceedings as in both, the Courts will be determining the lawfulness of the Defendants' acts.
41. The Plaintiff and Defendants all raised costs in support of their arguments. The Defendants submitted that the Strikeout Applications should proceed because they have been prepared and, therefore, costs will be wasted if the Proceedings are stayed whereas the Plaintiff points to a potential costs fallacy of spending even more money in circumstances where it may not be necessary for the Proceedings to proceed at all.

42. The Plaintiff submitted that I should take account of the fact that, were I to strike out his claims, he would have to appeal which would add to the time wasted ahead of CA's determination and, if the Judicial Review also failed, he would consider a wider challenge under the HRL on the basis that he should have a remedy. Advocate Grainge does not agree that these are a concern of this Court.

Decision

43. In accordance with the principles above, I have a broad discretion to stay the Proceedings.
44. It is most unusual for a Plaintiff to apply to the Court for a stay of his own proceedings. The authorities which were provided to me are of no assistance as how to approach such an application. I consider it particularly relevant to my consideration that this is a case where there are Strikeout Applications by the Defendants based on argument that there is no cause of action and that there is abuse of process by virtue of duplication. There are in effect two competing applications, the one, for the stay, to suspend the Proceedings and the other, the Strikeout Applications which, if successful, will bring the Proceedings to a close permanently. I must decide which path better serves the interests of justice in all the circumstances. I must consider the interests of all the parties and not just those of the Plaintiff who openly wants to keep his options open as demonstrated when he urged me to stay the Proceedings and waste no more time until "I know I want to proceed".
45. The Plaintiff sought to rely on the overriding objective in section 1 of the Royal Court Civil Rules and I have kept this at the front of my mind when considering this application.
46. I discount entirely from my deliberation whether either party might appeal this decision and the Plaintiff's statement that, if both the Proceedings and Judicial Review are unsuccessful, he would make a wider challenge under HRL on the basis that he must be entitled to a remedy.
47. The Plaintiff was very candid about why he commenced the Proceedings on 11th May namely because the order which had been originally made by the Bailiff on 12th March 2021 ordering the publication to be taken down, which order was extended by LB Roberts, was due to expire on 13th May. After the commencement of the Proceedings, the Plaintiff sought and secured agreement with the Second Defendant that there would be no further publication pending the outcome of the application for leave to appeal the Judicial Review, so the issue of the Proceedings served their immediate purpose from the Plaintiff's perspective.
48. I deal first with the issue of overlap between the matters to be determined by me if there is no stay and the Strikeout Applications are heard and the issues to be considered by CA (and potentially this Court, were leave granted for the Judicial Review to proceed).
49. It is clear that the CA will be concerned with damages under the HRL under s8 in the context of Judicial Review but not in the context of a claim under s7(1)(a) so I do not consider that there is any overlap created by the fact that the extent to which damages are available as a remedy is a live issue in both the Judicial Review and Proceedings.
50. It is correct that in both the Judicial Review and Proceedings, there will be a determination of the lawfulness of the Defendants' acts. In order to succeed on this limb of the Strikeout Applications as drafted, the Defendants seek to persuade me that the acts of the Defendants were "judicial acts" and that section 9(1) applies to prevent a claim under section 7(1)(a) save in the circumstances set out in that subsection and that those circumstances do not apply.
51. The status of the First Defendant is not in dispute and I consider that determining whether or not the act of the First Defendant in including the information about the Plaintiff in the Extended Reasons could be categorised as a judicial act under section 9(1) of the HRL to be entirely

discrete from the Judicial Review. In my judgement, the interests of justice would be met in terms by having that matter determined now.

52. The application based on section 9(1) to strikeout the claim in the Proceedings against the Second Defendant is not so straightforward as CA is going to be considering the status of the Second Defendant and specifically whether it was a “conduit” of the First Defendant, as the Defendants allege, or acting independently, as the Plaintiff alleges. I do not consider that I should proceed to investigate and determine that matter when the higher court is seized of it. I observe that is the sort of question which I might ultimately have concluded was outside the scope of a strikeout application in any event.
53. Turning to the broader issue of strikeout based on abuse of process founded on an argument that there are duplicate proceedings, I have to resolve the conflict between (1) not allowing any further legal time and costs to be expended on the Proceedings in circumstances where they may well be withdrawn if the CA grants leave for the Judicial Review (and delivers a judgment favourable to Plaintiff in terms of available remedies) and (2) allowing the Proceedings to remain extant in circumstances where the Plaintiff himself has said that the Proceedings would become duplicative were the CA to grant leave and could be styled vexatious, in the future. I do not consider that the existence of the Appeal prevents me from determining the strikeout application based on argument that the Proceedings are duplicative of the Judicial Review.
54. Having dealt with the potential overlap with the Appeal/Judicial Review, I must look at the substance of the application for a stay. I have already made the point that this is an application by a Plaintiff to stay his own proceedings, which he issued as a means to obtain interim relief, which he describes, in his own pleadings, as being in respect of substantially the same matters and which he says would become duplicative if an appeal allows another set of proceedings brought by him to be heard. I consider that it would be wrong in principle to grant a stay in such circumstances. The fact that there are live applications seeking to strike out the Proceedings for abuse of process based on duplication only serves to reinforce that this is not a case for a stay generally.
55. In terms of costs, I am persuaded that the fact that all parties have prepared for the strikeout applications supports those applications being heard.
56. I refuse the Plaintiff’s application for a stay generally but direct that the hearing of the Strikeout Applications will be limited to (1) the application of the First Defendant, based on the construction of sections 7(1)(a) and 9(1) of HRL and (2) in respect of both Defendants the applications based on abuse of process namely that there is a duplication of proceedings. In other words, I decline to determine the issue of whether the Second Defendant can rely upon section 9(1) to defeat a claim under s 7(1)(a). That part of the Proceedings is stayed under Rule 50 until either the claim against the Second Defendant is struck out for abuse of process, in which case it will fall away or, if there is no such strikeout, until the outcome of the Appeal at which point I order that a review be set at a time convenient to the parties at least 14 days after the CA’s judgment so that the Court can be updated as to the parties’ intentions.
57. I wish to make it clear that I have not pre-determined the outcome of the strikeout applications and specifically leave open the question as to whether, if I am satisfied that the actions or either of them should be struck out, this might be a case where I would not do so.

Costs

58. I will hear submissions as to costs.

Catherine Maureen Fooks

Judge of the Royal Court

11th November 2021