

IN THE GRAND COURT OF THE CAYMAN ISLANDS

0255
CAUSE NO: 0F 2009

BETWEEN: STUART KERNOHAN

PLAINTIFF

AND: (1) H.E. THE GOVERNOR STUART JACK CVO
on behalf of
THE GOVERNMENT OF THE CAYMAN ISLANDS
(2) MARTIN BRIDGER
(3) THE ACTING COMMISSIONER OF THE ROYAL
CAYMAN ISLANDS POLICE SERVICE
(4) THE ATTORNEY-GENERAL OF THE CAYMAN
ISLANDS

DEFENDANTS



WRIT OF SUMMONS



TO: H.E. THE GOVERNOR STUART JACK CVO
on behalf of
THE GOVERNMENT OF THE CAYMAN ISLANDS
4th Floor, Aall Building
North Church Street
George Town
Grand Cayman
Cayman Islands

AND TO: MARTIN BRIDGER
Central Police Station
George Town
Grand Cayman
Cayman Islands

AND TO: THE ACTING COMMISSIONER OF THE ROYAL CAYMAN ISLANDS
POLICE SERVICE
Central Police Station
George Town
Grand Cayman
Cayman Islands

AND TO: THE ATTORNEY-GENERAL OF THE CAYMAN ISLANDS
Government Administration Building
George Town
Grand Cayman
Cayman Islands
(by virtue of the Crown Proceedings Law (1997 Revision))

THIS WRIT OF SUMMONS has been issued against you by the above-named Plaintiff in respect of the claim set out on the next page.

Within (14 Days) after the service of this Writ on you, counting the day of service, you must either satisfy the claim or return to the Court Office, P.O. Box, 495, George Town, Grand, Cayman KY1-1106, the accompanying Acknowledgement of Service stating whether you intend to contest these proceedings.

If you fail to satisfy the claim or to return the Acknowledgment within the time stated, or if you return the Acknowledgement without stating therein an intention to contest the proceedings, the Plaintiff may proceed with the action and judgement may be entered against you forthwith without further notice.

Issued this day of May 2009

NOTE – This Writ may not be served later than 4 calendar months (or, if leave is required to effect service out of the jurisdiction, 6 months) beginning with the date of issue unless renewed by order of the court.

IMPORTANT

Directions for Acknowledgment of Service are given with the accompanying form.

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CAYMAN ISLANDS DEFENDANTS**

STATEMENT OF CLAIM

1. By an agreement in writing dated 19th September 2005 (“the Contract of Employment”) made between Bruce H. Dinwiddy (predecessor of the First Defendant in the position of Her Majesty’s Governor of the Cayman Islands) and the Plaintiff, the Plaintiff was appointed to the position of Commissioner of the Royal Cayman Islands Police Service (“RCIPS”) for a fixed term of 48 months, commencing 15th October 2005 and ending 14th October 2009 (“the Term”).
2. By clause 5 of the Contract of Employment, the Plaintiff was entitled to be remunerated as follows:
 - (a) Salary at the rate of Grade D Point 8
 - (b) Special Supplements as follows:
 - (i) Pension 6% employer’s contribution, 6 % employee’s contribution, both funded by the employer

- (ii) Housing allowance CI\$2,700 per month (pensionable)
- (iii) Laundry CI\$75 per month
- (iv) Transport – a motor vehicle was to be provided.
- (v) Overtime and time in *lieu* of overtime

The Plaintiff was also entitled to medical benefits for himself, his wife and his daughter.

3. By clause 6 of the Contract of Employment, the terms and conditions set out in Chapter 8 of the General Orders, as amended from time to time, were incorporated into the Contract of Employment.
4. By clause 13 of the Contract of Employment, it was agreed that, except for any provision which applies by virtue of law, all the terms of the Plaintiff's employment were contained in the Contract of Employment.
5. By clause 14 of the Contract of Employment it was agreed that the Contract of Employment could not be varied or amended unless in writing signed by the employer and the employee and stating the date on which the new provisions were come into operation.
6. By a letter dated 27th March 2008 ("the First Letter"), unlawfully and in breach of the Contract of Employment, which contained no term permitting him to do so, the First Defendant placed the Plaintiff on "required leave" with immediate effect.
7. The First Letter purported to impose conditions on the Plaintiff's conduct during his period of "required leave", including, *inter alia*, a condition that the Plaintiff could not leave the "Island" without the First Defendant's permission ("the Condition"), which condition amounted to false imprisonment. Such conditions, in particular, the Condition, were unlawful and, in any event, were in breach of Clause 14 of the Contract of Employment.

8. The First Letter, and its terms and conditions, were a serious breach of the implied term of trust and confidence which is essential to the relationship of employer and employee (“Implied Term 1”).
9. Further, on 27th March 2008, the First Defendant held a press conference, attended by the Second Defendant, a special constable of the RCIPS, for whom the Third Defendant is vicariously liable, at which it was stated, falsely and with deliberate effect, that the Plaintiff was not under investigation for any disciplinary or criminal offence.

PARTICULARS OF FALSITY

- (a) The statement made at the press conference to the effect that the Plaintiff was not under investigation for any disciplinary or criminal offence was false because, in fact, as at 27th March 2008, as the First and Second Defendants well knew, the Plaintiff was under investigation in relation to offences under sections 95 and 121 of the Penal Code (2007 Revision) by:
 - (i) the Second Defendant who was seconded from the Metropolitan Police Service to the RCIPS and enrolled as a special constable, and for whom the Third Defendant vicariously liable and
 - (ii) the members of his special investigation team (“the Team”), comprised of officers seconded to the RCIPS from the Metropolitan Police Force in London, United Kingdom, and enrolled as special constables of the RCIPS, for whom the Third Defendant is vicariously liable,
- (b) The investigation was and is code-named “Operation Tempura”.
- (c) By applications made to the Chief Justice of the Cayman Islands on 20th February 2008, 13th and 20th March 2008 (“the Applications”), Special Constables Ali and Smith, (both members of the Team)(“the Applicants”),

represented by Mr. André MonDésir, Special Counsel to the First Defendant, had applied, unsuccessfully, to the Grand Court for search warrants in respect of the Plaintiff and others on the basis that it was alleged there were reasonable grounds for suspecting that the Plaintiff and others had committed the offences described in section 95 and/or 121 of the Penal Code (2007 Revision) as part of an ongoing investigation into suspected criminal activity by the Plaintiff and others.

10. The press conference on 27th March 2008 was of such tone and nature as to imply by innuendo serious misconduct and/or criminal activity on the part of the Plaintiff, causing serious damage to his professional and personal reputation, and to the jurisdiction of the Cayman Islands, and amounted to a further serious breach of Implied Term 1 by the First Defendant.
11. The innuendo was false.

PARTICULARS OF FALSITY

The Plaintiff has not, and could not reasonably have been suspected of having, committed either of the offences under section 95 or 121 of the Penal Code (2007 Revision), nor any other criminal offence. The Plaintiff will rely on the decision of the Chief Justice *In re: Operation Tempura* dated 4th April 2008 (“the Decision”) for its full terms and effects, including the complete exoneration of the Plaintiff at paragraph 122 of the ruling.

12. At all material times until 1st October 2008, the Plaintiff was unaware of the Applications or the Decision. However, the First Defendant, by his counsel, Mr. MonDésir, and the Second Defendant, were or ought to have been aware of the decision of the Chief Justice in relation to the search warrants not later than 4th April 2008, the date on which the Decision was released to the Applicants.

13. The Third Defendant should and would have approved the decision to make the Applications, and was or ought to have been aware of the refusal of the Applications and the contents of the Decision.
14. Notwithstanding the matters set out in Paragraphs 11 above 12 above, and the promise made by the First Defendant in the First Letter to keep the terms of the Plaintiff's required leave "under review", the First Defendant failed to reinstate the Plaintiff to his position either shortly after the 4th April 2008 or at all. The Plaintiff says that, following the release of the Decision to the Applicants on 4th April 2008, it was irrational and unreasonable for the First Defendant to maintain him on required leave, as it was, or ought to have been clear that there were no grounds for doing so.
15. Failure to reinstate the Plaintiff to his position within a reasonable time after 4th April 2008 was a further serious breach of Implied Term 1.
16. Further, as there is no provision in the Contract of Employment concerning "required leave", and as it is an implied term of the Contract of Employment that the First Defendant should provide the Plaintiff with work ("Implied Term 2"), the failure of the First Defendant to recall the Plaintiff to his position was a serious breach of Implied Term 2.
17. Notwithstanding the above, the First Defendant maintained the Plaintiff on required leave. During the months of April, May, June, July and August 2008, the Second Defendant continued to make statements to the print and broadcast media concerning the Plaintiff's position, which statements were widely reported, including on the internet, giving rise to yet further innuendo and speculation. Full particulars of the statements referred to in this paragraph are extensive, and will be provided by way of copy documents on discovery. Such innuendo and speculation caused further serious damage to his professional and personal reputation, and to the jurisdiction of the Cayman Islands.

18. The innuendo was false (the particulars set out in Paragraph 11 above are repeated), and were malicious, in that the Second Defendant made the statements not caring about the effect on the Plaintiff's reputation or the reputation of the Cayman Islands.

19. Further, by letter dated 15th August 2008, the Plaintiff's attorneys drew the First Defendant's attention to the effect that the statements made by the Second Defendant were having on the Plaintiff and his family, and stated that the First Defendant had taken no steps to dissociate either himself or the Cayman Islands Government from the innuendo and speculation. Such failure amounted to a further serious breach of Implied Term 1, yet the First Defendant did not, and has never, remedied that breach. Such failure on the part of the First Defendant was indicative that he did not care about the effect on the Plaintiff's reputation and was a further breach of Implied Term 1, and malicious.

20. On or about 15th May 2008, the Plaintiff was given notice by the First Defendant that he was under investigation as follows:

<p><i>Name and Address of complainant:</i> DCS Martin Bridger, Police Headquarters, Elizabethan Square, George Town, Grand Cayman</p>
<p>Nature of Offence</p>

1. Misconduct in a public office

Contrary to common law, in that you, Stuart KERNOHAN, between 13th August 2007 and 3rd September 2007, within the jurisdiction of the Cayman Islands, being a person in the public service failed to carry out a proportionate investigation by not undertaking reasonable lines of enquiry in relation to allegations made by Mr. Lyndon MARTIN against Deputy Commissioner of Police Anthony ENNIS and Mr. Desmond Seales the Editor in Chief of Cayman Net News which culminated in an unlawful act, namely the unlawful entry into and search by John EVANS of the office of Mr. Desmond SEALES, located at CAYMAN NET NEWS OFFICES, 105 ALISSTA TOWERS, 85 NORTH SOUND ROAD, GEORGE TOWN

GRAND CAYMAN, prejudicial to the rights of the said Mr. Desmond SEALES.”

21. Misconduct in Public Office, contrary to common law, is a very similar offence to that previously alleged against the Plaintiff under section 95 of the Penal Code (2007 Revision).
22. The Notice of Investigation set out in Paragraph 20 above (“the Notice of Investigation”) does not disclose matters sufficient to amount to an allegation of Misconduct in Public Office at common law. Further:
 - (a) The actions of the Plaintiff in relation to the matters complained of were reasonable and proportionate lines of inquiry, as was implicit from the Decision.
 - (b) As the First and Second Defendants well knew, the Chief Justice had held that the actions of Mr. John Evans did not amount to an unlawful act (paragraph 122 (ii)) and
 - (c) In any event, the Plaintiff was acting with lawful excuse and justification, namely the lawful investigation of a serious criminal allegation which had been made by apparently credible witnesses.
23. The First and Second Defendants were, or ought to have been, aware of the matters set out in Paragraphs 21 above. They ought also to have been aware that the allegations made in the Notice of Investigation were substantially the same, and based on the same facts, as the allegations put before the Chief Justice during the Applications and that, accordingly, they had no realistically possible chance of successfully prosecuting the Plaintiff on the basis of that material.
24. By a letter dated 30th April 2009, the Plaintiff was informed that the investigation into his conduct had been closed and that he would not be charged with any criminal offence arising out of the investigation.

25. The Third Defendant should and would have approved the decision to give the Notice of Investigation, and should or ought to have been aware of the matters set out in Paragraphs 20 to 24 above.
26. In or about early July 2008, the Plaintiff's salary was paid into his bank account in the Cayman Islands, and then withdrawn, apparently at the request of the Government of the Cayman Islands. Such conduct amounted to:
 - (a) A repudiatory breach of the Contract of Employment on the part of the First Defendant and
 - (b) A further serious breach of Implied Term 1 by the First Defendant.
27. The Plaintiff's salary was repaid to him following written complaint by his attorneys, but this did not remedy the breach of Implied Term 1 set out in Paragraph 26(b) above.
28. By letter dated 10th September 2008, the Plaintiff's English solicitors, Russell Jones & Walker ("the RJW Letter"), wrote to the Second Defendant correctly stating that the Notice of Investigation did not disclose a criminal offence.
29. Notwithstanding the matters set out above, and the promise made by the First Defendant in the First Letter to keep the terms of the Plaintiff's required leave "under review", the First Defendant failed to recall the Plaintiff to his position either shortly after 10th September 2008 or at all. The Plaintiff says that, in addition to the matters set out in Paragraph 14 above, following receipt of the RJW Letter it was irrational and unreasonable for the First Defendant:
 - (a) to maintain the Plaintiff on required leave, as it was, or ought to have been clear that there were no grounds for doing so, alternatively
 - (b) not to take competent Cayman Islands' legal advice on Cayman Islands' law concerning the contents of the RJW Letter (i.e. the statement that the Notice of

Investigation disclosed no criminal offence); if he had done so, he would have been properly advised that the Notice of Investigation did not disclose a criminal offence, in which case he should have reinstated the Plaintiff in his position.

30. Failure to reinstate the Plaintiff to his position within a reasonable time after 10th September 2008 was a further serious breach of the Implied Term 1 by the First Defendant.
31. Further, the failure of the First Defendant to recall the Plaintiff to his position within a reasonable period after 10th September 2008 was a serious breach of Implied Term 2 by the First Defendant.
32. The Plaintiff became aware of the Decision on 1st October 2008.
33. By letter dated 9th October 2008 to the First Defendant, the Plaintiff, by his attorneys, demanded that, *inter alia*, in the light of the Decision the First Defendant should reinstate the Plaintiff within 7 days. This letter was obviously important and required, as a matter of proper public administration, and as part of the obligation under Implied Term 2, an urgent response.
34. Wrongfully, and in breach of Implied Term 2, neither the Plaintiff nor his attorneys received any response to that letter.
35. The decision of Cresswell J. in Cause no. 464 of 2008 (**R v. Ebanks ex p. Henderson**) was delivered in open court on 29th October 2008 (“Cresswell J.’s Ruling”). The decision authoritatively described the offence of misconduct in public office contrary to common law, as it pertains in the Cayman Islands.
36. The First to Third Defendants should have, as a matter of urgency, reviewed the Notice of Investigation in the light of Cresswell J.’s Ruling. If they had done so, they would have realised that the Notice of Investigation did not disclose a criminal offence. It is to

be inferred that they did not. If they had done, the First Defendant would have been obliged to review Plaintiff's position, and conclude that he should be reinstated.

37. Notwithstanding the matters set out above, and the promise made by the First Defendant in the First Letter to keep the terms of the Plaintiff's required leave "under review", the First Defendant failed to recall the Plaintiff to his position either shortly after the 29th October 2008 or at all. The Plaintiff says that, in addition to the matters set out in Paragraph 36 above, following delivery of Cresswell J's Ruling it was irrational and unreasonable for the First Defendant:
- (a) to maintain the Plaintiff on required leave, as it was, or ought to have been clear that there were no grounds for doing so, alternatively
 - (b) not to take competent Cayman Islands' legal advice on Cayman Islands' law concerning the contents of Cresswell J.'s Ruling (i.e the elements of the offence of misconduct in public office contrary to common law, as it pertains in the Cayman Islands) and the state of the evidence against the Plaintiff; if he had done so, he would have been properly advised that the Notice of Investigation did not disclose a criminal offence, in which case he should have reinstated the Plaintiff in his position without delay.
38. Failure to reinstate the Plaintiff to his position within a short time after 29th October 2008 was a further serious breach of the Implied Term 1 by the First Defendant.
39. Further, the failure of the First Defendant to recall the Plaintiff to his position within a short time after 29th October 2008 was a serious breach of Implied Term 2 by the First Defendant.
40. Further, in his ruling, Cresswell J. held that the Second Defendant had been guilty of the "gravest abuse of the process" in his conduct of the matters complained of in Cause 464 of 2008. That finding, which has not been appealed, together with the criticisms made of the Second Defendant in the Decision should have prompted the First and Third

Defendants to consider whether the Second Defendant's "investigation" into the Plaintiff's conduct might also be an abuse of the process alternatively, a disproportionate response to the matters under investigation.

41. The Plaintiff will say that, following delivery of Cresswell J's Ruling it was irrational and unreasonable for the First and Third Defendants:
 - (a) to maintain the Plaintiff on required leave, as it was, or ought to have been clear that there were no grounds for doing so, alternatively
 - (b) not to take competent legal advice on Cayman Islands' law concerning the conduct of the Second Defendant, in particular whether the Second Defendant's "investigation" into the Plaintiff's conduct was or might also be an abuse of the process alternatively, a disproportionate response to the matters under investigation.
42. If the First and Third Defendants had taken competent Cayman Islands' legal advice, as described in Paragraph 41(b) above, they would have been properly advised that the conduct of the Second Defendant, in particular whether the Second Defendant's "investigation" into the Plaintiff's conduct was or might also be an abuse of the process alternatively, a disproportionate response to the matters under investigation, in which case the First Defendant should have reinstated the Plaintiff in his position without delay.
43. In the light of matters which have occurred since 29th October 2008, it is to be reasonably inferred that they did not take competent Cayman Islands' legal advice, as described in Paragraph 41(b) above.
44. For these further reasons:
 - (a) failure to reinstate the Plaintiff to his position within a short time after 29th October 2008 or at all was a further serious breach of the Implied Term 1 by the First Defendant and

- (b) the failure of the First Defendant to recall the Plaintiff to his position within a short time after 29th October 2008 or at all was a serious breach of Implied Term 2 by the First Defendant.
45. By a letter dated 18th November 2008 (“the Second Letter”), unlawfully, and in breach of the Contract of Employment, the First Defendant summarily dismissed the Plaintiff from his position as Commissioner of the RCIPS.
46. The Second Letter discloses no reasonable grounds for the dismissal, summary or otherwise, of the Plaintiff. In particular, its reliance on the lawfulness of the Condition is misconceived and contrary to law for the reasons set out in Paragraph 7 above.
47. Further, it is an obvious inference that sending the Second Letter and the summary dismissal of the Plaintiff were the result of an irrational and unreasonable reaction by the First Defendant to the publication of the letter dated 9th October 2008 referred to in Paragraph 33 above, which letter had been published as a direct result of the First Defendant’s own failure to respond to urgent correspondence.
48. The Plaintiff says that each of the individual breaches of the Contract of Employment outlined above was sufficient in itself to give rise to an immediate right on his part to terminate the Contract of Employment by accepting the First Defendant’s repudiatory breach and that taken cumulatively, they collectively amount to a repudiatory breach of the Contract of Employment, which the Plaintiff hereby accepts.
49. By reason of the Plaintiff’s wrongful and unlawful dismissal by the First Defendant, in breach of the Contract of Employment, he has suffered loss and damage:
- (a) Salary and benefits until the end of the term.
- (b) Repatriation expenses.

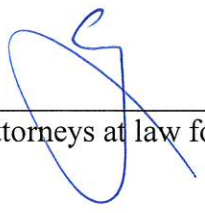
50. Further, the First Defendant's breaches of the Contract of Employment have caused the Plaintiff to suffer foreseeable damage to his professional and personal reputation, for which he is entitled to be compensated, both by way of general damages, and for future loss of earnings, as he will or may be unable to obtain a replacement position of similar professional standing as a result of the wrongful stigma attaching to him by reason of the First Defendant's conduct.
51. Further, the matters set out above amount to misfeasance in public office on the part of the First and Second Defendants, whereby the Plaintiff has suffered loss and damage as set out above.
52. Further, the matters set out above amount to defamation of character, both slanderous and, in relation to printed material, libellous, on the part of the First and Second Defendants, whereby the Plaintiff has suffered loss and damage as set out above.
53. The Third Defendants is vicariously liable for the Second Defendant.
54. Further the Plaintiff seeks and is entitled to interest pursuant to section 34(1) of the Judicature Law (2007 Revision) at such rate from such date and on such amount as the Court thinks fit.

AND THE PLAINTIFF CLAIMS:

- (1) A declaration that the Contract of Employment has been unlawfully terminated by the First Defendant
- (2) Damages
- (3) Interest pursuant to section 34(1) of the Judicature Law (2007 Revision) to be assessed.
- (4) Such further or other relief as this honourable Court thinks fit.

(5) Costs.

Dated 25th May 2009



CAMPBELLS, Attorneys at law for the Plaintiff

THIS WRIT and STATEMENT OF CLAIM was issued by Campbells, Attorneys-At-Law for the Plaintiff whose address for service is P.O. Box 884, 4th Floor, Scotia Centre, Albert Panton Street, George Town, Grand Cayman KY1-1103 (STM/15303)