

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/35 of 2018

BETWEEN:

SHIRLENE WILLIAMS

Employee

And

THE EASTERN CARIBBEAN CIVIL AVIATION AUTHORITY

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

Appearances:

Mr. Anderson Carty of Antigua & Barbuda Tradesmen & United Workers'
Federation, Representative for the Employee

Ms. Nina C. Joseph, In-House Legal Counsel for the Employer

2018: August 29

2021: May 28

**DECISION ON APPLICATION TO STRIKE OUT REFERENCE FOR WANT OF
JURISDICTION**

Brown, P:

Background

1. The Employer was established by Agreement between the governments of several members of the OECS, including Antigua and Barbuda in 2003. That Agreement was recognized and enshrined in national law under the provisions of the Eastern Caribbean Civil Aviation Agreement Act, No 24 of 2003 (the ECCA Act). Its mandate includes the establishment, and enforcement of the regulatory framework for civil aviation in the participating states of the OECS.

2. At the material time the Employee held the position of “Personal Licensing Officer” within the Employer’s organizational structure. Her supervisor was Mr. Sylvester Dardine who held the position of “Director of Flight Safety”.
3. By her Reference of Complaint filed on June 26, 2018, the Employee commenced these proceedings for the determination of the issue of unfair dismissal. In her Memorandum of Claim she set out the chronology of events which led up to her dismissal by letter dated January 10, 2018.
4. After it was served with the claim, the Employer failed or refused to file its Memorandum of Defence as required by the Rules (ICPR 2015). As a result, by application filed on July 27, 2018 the Employee applied for an order granting her an ex parte trial. In response, the Employer filed an affidavit in opposition in which it disputed the Employee’s claim and asserted its statutory immunity.
5. At the Case Management Conference held on October 26, 2018 the Court’s main focus was on the Employer’s preliminary application to strike out the Claim on the ground of its statutory immunity from legal process under the ECCA Act.

Statutory Provisions

6. The Antigua and Barbuda Labour Code (the Labour Code) sets out the national policy and the broad legal framework for determining claims of unfair dismissals. Section A 6 provides:

“(1) To the extent that the provisions of this Code apply to employers, they shall apply to all employers in Antigua and Barbuda including the Government as the employer of its non-established employees; but they shall not bind the Government as the employer of its other employees.

(2) To the extent that provisions of this Code apply to employees, they shall apply to all employees of employers in Antigua and Barbuda including non-established employees of the Government; but they shall not apply to:

...

(d) persons holding the status of diplomatic agents; or

”

...

7. Further, section A 10 of the Labour Code provides:
 “To the extent that there may be conflict between any provision of this Code and any provision of existing law not specially repealed in one or another of the Divisions herein, the applicable provision of this Code, as of its effective date, shall prevail over said provision of existing law.”

8. The Industrial Court was established under the Industrial Court Act, section 3 of which provides:

“(2) This Act does not apply to –

...

(d) persons holding the status of diplomatic agents;

”

9. The Agreement establishing the Employer as a body corporate comprise the Schedule to the ECCA Act. Article 25 of that Schedule provides that:

“(7) The Authority, officers and employees of the Authority-

(a) Shall be immune from legal process with respect to acts performed by them in their official capacity except when such immunity is waived by the Authority;

”

The Submissions

10. In his oral submissions, Mr. Carty highlighted the Employer's disregard for the court process in that up to date of filing its affidavit in opposition, it had taken no steps for virtually two months since it was served with the claim. Further, he relied on the following grounds for contending that the Employer's application should be rejected.
11. Firstly, Mr. Carty contended that, notwithstanding the terms Article 25, since the employment contract pre-dates the ECCA Act by almost 10 years, the latter should not operate to preclude the application of the Labour Code.
12. Secondly, Mr. Carty submitted that the immunity bestowed applies to the Employer's exercise of regularity authority and not to its other administrative functions which could give rise to claims of unfair dismissals. In buttressing his submission, Mr. Carty referred to Article 4 which sets out the purposes of the Employer. He emphasized that those purposes are fulfilled in the regional context and do not extend to conditions of employment which are governed by national policy as reflected in the related statutory provisions.
13. Thirdly, Mr. Carty maintained that, notwithstanding the express statutory immunity under the ECCA Act, there are several minimum standards established by the Labour Code and the principles of good industrial relations which all employers must meet.

14. Fourthly, Mr. Carty asserted that the immunity granted by the ECCA Act is limited to “persons holding the status of diplomatic agents”. And since the Employee did not hold the position of a diplomat or performed as a diplomatic agent, she would not fall within the group of persons excluded under section A 6(d) of the Labour Code.
15. Finally, Mr. Carty submitted that the Employer’s own regulations for dispute resolution are superseded by the provisions of the Labour Code.
16. In response, Ms. Nina Joseph, Counsel for the Employer, relied on the express immunity provisions under Article 25 as well as selected judgments. She underscored the fact that the Employer is recognized and protected by the ECCA Act as a regional body.
17. Further, Learned Counsel submitted that the Employer falls squarely within the group of exemptions specified in Section 3 (2) (d) of the Industrial Court Act. In that regard, Counsel submitted that this Court is “bound to operate within its statutory parameters”.
18. In developing her submissions, Counsel further asserted that the immunities of the Employer as a regional body extend to all its officers and employees who are required by the Employer to discharge its statutory duties: She quotes Article 10 (3) as follows:

“The Director General shall serve as the Chief Executive Officer of the Authority to be in charge of and responsible to the Board for the implementation of the policy and day-to-day administration and management of the Authority.”

Relying on that Article, Counsel submitted that when serving as Chief Executive Officer, the Director General must retain and engage appropriate staff to properly discharge its managerial and administrative functions. And any officer or employee to whom any of those functions are delegated are clearly immune by virtue of Article 25 (7) of the Agreement.

19. Counsel also submitted that if the intention of Parliament was to incorporate the provisions of the Labour Code and make them applicable to the Employer, it would have done so in clear terms. And in the absence of any such express terms, the sweeping exception under section A 6 (d) of the Labour Code should apply.

Discussion

20. It is noteworthy that both the Labour Code and the Industrial Court Act use identical terms to exempt the category of “diplomatic agents” from the scope of their application. It follows that any person engaged as a diplomatic agent would be exempt.
21. The definition of “diplomatic agent” as stated in Black’s Law Dictionary (10th Edition) is as follows:

“A national representative in one of four categories: (1) ambassadors, (2) envoys and ministers plenipotentiary, (3) ministers resident accredited to the sovereign, or (4) charges d’affaires accredited to the minister of foreign affairs.”

Clearly, that definition excludes the Employer, its officers and employees from category of persons expressly exempted under sections A (6) (2) d and 3 (2) of the Labour Code and the Industrial Court Act respectively. Thus, I find that there is nothing in those two Acts which would exclude the Employer, its officers and employees from their application. Moreover, by virtue of section A 10 of the Labour Code, there existed no provision in law as at September 1975, when the Industrial court Act was passed, to preclude the Employer, its officers and employees from the jurisdiction of the Industrial Court.

22. I now turn my attention to the provisions of the ECCA Act which was passed subsequently in 2003. There is no doubt that the Employer is clothed with a special jurisdiction with related exclusive and extensive powers. These are set out in Articles 4 and 5 of the Agreement. It will suffice to note that one the Employer’s main purposes is to:

“(a) To regulate matters relating to civil aviation, safety and security in the Participating States;

...”

Similarly, it will suffice to note that the main powers of the Employer include one to:

“...”

(g) Regulate civil aviation in the Participating States on behalf of and in collaboration with Participating States;

...”

23. In emphasizing the special status of the Employer, Counsel also relied on section 7 of the Antigua and Barbuda Sales Tax (Amendment Regulations 2008 which amended Schedule 7 of the Principal Regulations to include the Employer in the

list of Diplomatic Missions and Approved International Agencies which are exempt from the payment of Sales Tax. It is obvious that the list includes both Diplomatic Missions, such as the Embassy of Venezuela, and International Agencies, such as the West Indies Cricket Board.

24. Moreover, as pointed out by Counsel, it is instructive to note that the special status of the Employer was given further statutory recognition in the Revised Treaty of Basseterre Establishing the Organization of Eastern Caribbean States Economic Union Act 2011, the Employer is recognized alongside the Eastern Caribbean Supreme Court and the Eastern Caribbean Central Bank as an Institution of that Organization.
25. Article 21 of the Revised Treaty recognizes the OECS as an international Organization. Further, that Article provides that the privileges and immunities of the OECS Commission and its senior officials shall be the same as those accorded to members of diplomatic missions in the Member States such as Antigua and Barbuda.
26. In light of the abundant statutory provisions, I am persuaded that Parliament intended to shield the Employer, it's officers and employees, to the same extent as it would shield diplomatic agents, from the rigours of customary legal processes. I hasten to add the obvious proviso that the shield of diplomatic immunity operates only where the Employer is acting in pursuance of its statutory purposes and powers under Articles 4 and 5 of the ECCA Act.
27. In coming to that conclusion, I am mindful of the well-established presumption underlying statutory interpretation, namely, Parliament is presumed to know the precise nature and extent of existing law. Thus, when it passed the ECCA Act granting the Employer immunity from legal process, Parliament was well aware of the pre-existing provisions of sections A(6) and 3 (2) respectively of the Labour Code and the Industrial Court Act.
28. That conclusion does not mean that the express immunity may not be challenged in the High Court. The persuasive authorities from the European Court of Human Rights as cited by Counsel, including **Waite and Kennedy v Germany** (GC) Application No. 26083/94 ECHR 1999 and **Stitching Mothers of Srebrenica v Netherlands**, (TS) Application No. 65542/12 ECHR 2013 -11, are instructive in that regard.
29. Those authorities establish that the Employer's immunity may be challenged as being unconstitutional if it deprives any person of his right of access to this Court under section 15 (8) of the Constitution. Such a challenge may succeed in the absence of an adequate alternative path towards full and fair resolution of

disputes, including matters of unfair dismissal, and inevitably lead to consideration of the adequacy of the Employer's own machinery for dispute resolution as set out in the OECS Staff Rules and the OECS Staff Regulations. Such a challenge would be wholly beyond the jurisdiction of this Court.

30. For the reasons stated above, I am constrained to decline the Employee's application for an ex parte trial. However, I will refrain from striking out her claim in this Court. Instead, I am inclined to grant a stay of these proceedings pending the outcome of proceedings in the High Court, which the Employee is at liberty to commence, challenging the express statutory immunity of the Employer, its officers and its employees.

31. Accordingly, it is hereby ordered that:

- 1) The proceedings in this Reference are hereby stayed pending an Order of the High Court as to the immunity of the Employer, its officers and employees under Article 25 of the Agreement Establishing the Eastern Caribbean Civil Aviation Authority as set out in the Schedule to the Eastern Caribbean Civil Aviation Act, 2003.
- 2) Subject to the determination of any relevant proceedings in the High Court, these proceedings be continued, be discontinued, struck out or dismissed, as the case may be, by notice or an appropriate application by either party.
- 3) There shall be no order as to costs.

Dated  day of May, 2021.


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Charlesworth O. D. Brown
President