

ROWLEY v. MINISTRY OF DEFENCE and LIMA

SUPREME COURT (Schofield, C.J.): April 12th, 1996

Tort—vicarious liability—Crown employees—Ministry of Defence liable under Crown Proceedings Ordinance, s.4(1)(a) only for torts of employees paid from Consolidated Fund—no action for damages for wrongful arrest and detention by Gibraltar Services Police

Employment—dismissal—wrongful dismissal—Crown employees—no action for damages under Crown Proceedings Ordinance, s.3 for wrongful dismissal of Gibraltar Services Police officer because no petition of right before Ordinance passed—industrial tribunal or English courts may have jurisdiction

Civil Procedure—judgments and orders—declaratory judgment—no declaration of liability if damages may not be awarded and other court or tribunal may have jurisdiction over dispute

Administrative Law—Crown proceedings—proper defendant—Attorney-General is proper defendant in civil proceedings against Crown

The plaintiff brought proceedings against the defendants for wrongful arrest, wrongful detention and wrongful dismissal.

The plaintiff and the second defendant were members of the Gibraltar Services Police and, as such, were employed by the Ministry of Defence, the first defendant. The second defendant, on the instructions of his employer, arrested and detained the plaintiff on suspicion of committing a criminal offence. Although the plaintiff was never charged, he was dismissed from the service. He sought declarations that he had been wrongfully arrested and detained and wrongfully dismissed, and damages in respect of each allegation.

The first defendant applied for the plaintiff's writ of summons to be set aside on the basis that the court lacked jurisdiction to hear the proceedings. It submitted that (a) the plaintiff could not bring an action either in tort or contract against the British Government since, under the Crown Proceedings Ordinance, s.3, a person was permitted to sue the Crown only if he would have had a claim by petition of right at common law had the Ordinance not been passed, and the plaintiff would have had neither; (b) the specific provisions of s.4 of the Ordinance dealing with the Crown's liability in tort for the acts of its employees did not enable the plaintiff to bring an action against it for wrongful arrest and detention, since that section defined the Crown's servants and agents as persons paid out of the Consolidated Fund, which the Gibraltar Services Police were not; and (c) in any event, since s.12 of the Ordinance required that proceedings against the Crown be instituted against the Attorney-General, the first defendant was the wrong defendant, and the plaintiff's writ of summons should be set aside.

Held, setting aside the writ of summons:

(1) The court had no jurisdiction to hear the plaintiff's claims for damages against the Ministry of Defence for wrongful arrest and wrongful detention since, by virtue of s.4(6) of the Crown Proceedings Ordinance, the Crown could only be found liable under s.4(1) in respect of torts committed by persons in its employ who were paid out of the Consolidated Fund, which the second defendant was not. Furthermore, s.3 of the Ordinance did not assist the plaintiff, since he would have had no claim for damages by petition of right under common law for the tortious acts of the second defendant, a Crown servant acting on the Crown's authority (page 260, lines 6–21).

(2) Nor could the plaintiff claim damages in the Supreme Court for wrongful dismissal by virtue of s.3, since at common law prior to the passing of the Crown Proceedings Ordinance, Crown employees were dismissible at will and had no remedy by petition of right. Even if, as employment law now stood, the plaintiff could claim damages against the Crown, that claim would need to be heard in the industrial tribunal, or in the English courts (page 260, lines 16–28; lines 37–44).

(3) Since damages could not be awarded against the Crown, it would be inappropriate for the court to grant declaratory relief, particularly as another court might have jurisdiction in respect of the contractual claim (page 260, lines 32–45).

(4) In any event, under s.12 of the Ordinance, the proper defendant in proceedings against the Crown in Gibraltar should have been the Attorney-General and not the Ministry of Defence. For this and all of the reasons above, the plaintiff's writ of summons would be set aside as against the first defendant (page 261, lines 1–7).

Legislation construed:

Crown Proceedings Ordinance (1984 Edition), s.3: The relevant terms of this section are set out at page 259, lines 36–43.

s.4: The relevant terms of this section are set out at page 260, lines 1–4; lines 8–13.

s.12: The relevant terms of this section are set out at page 261, lines 3–4.

S. Ross for the plaintiff;

C.M. Rocca for the defendants.

SCHOFIELD, C.J.: This is an application made on behalf of the first defendant, the Ministry of Defence, to set aside the writ of summons, under the Rules of the Supreme Court, O.12, r.8.

15 The plaintiff and the second defendant were members of the Gibraltar Services Police, a body of the civilian police in the employment of the Ministry of Defence. They were thus officers of the Crown in right of its Government in the United Kingdom. They were not officers of the Crown in right of its Government of Gibraltar.

20 In October 1992 the plaintiff was arrested by the second defendant on suspicion of attempting to export tobacco into Spain without a licence. No charges were ever brought against the plaintiff but he found himself before the Disciplinary Board of the Gibraltar Services Police and was recommended for dismissal. He appealed but was dismissed with effect from March 19th, 1993. He maintains that his arrest and subsequent
25 detention were wrongful and that he was also wrongfully dismissed from the Gibraltar Services Police. He claims declarations accordingly, damages and costs both against the second defendant and against the Ministry of Defence as his employer and as the employer of the second defendant.

30 The general rule at common law was that no proceedings lay against the Crown. The main method by which, formerly, redress might be sought against the Crown was by way of petition of right. All that has now changed of course, and the Crown Proceedings Ordinance declares “the law relating to the civil liabilities and rights of the Crown. . . .” Section 3
35 of the Ordinance provides for the general right to sue the Crown. It reads:

40 “Where any person has a claim against the Crown after the commencement of this Ordinance, and, if this Ordinance had not been passed, the claim might have been enforced, subject to the grant of the Governor’s fiat, by petition of right, then, subject to the provisions of this Ordinance, the claim may be enforced as of right, and without the fiat of the Governor, by proceedings taken against the Crown for that purpose in accordance with the provisions of this Ordinance.”

45 Section 4 of the Ordinance provides for the liability of the Crown in tort. The relevant portion reads:

“(1) Subject to the provisions of this Ordinance, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject—

(a) in respect of torts committed by its servants or agents. . . .”

In this suit there are claims in tort for wrongful arrest and detention and in contract for wrongful dismissal. So far as the claim in tort is concerned, s.4(1) does not aid the plaintiff because of s.4(6), which reads:

“No proceedings shall lie against the Crown by virtue of this section in respect of any act, neglect or default of any officer of the Crown, unless that officer has been directly or indirectly appointed by the Crown and was at the material time paid in respect of his duties as an officer of the Crown wholly out of the Consolidated Fund.”

Members of the Gibraltar Services Police are not paid out of the Consolidated Fund.

Section 3 of the Ordinance does not come to the aid of the plaintiff either in respect of his claim in tort or in respect of his claim in contract, as is apparent from 9 *Halsbury’s Laws of England*, 2nd ed., para. 1177, at 691, since a petition of right did not lie “for damages for a tort alleged to have been committed either by the Crown or by a servant of the Crown acting by the Crown’s authority.” Furthermore (*loc. cit.*, at 692):

“Military, naval, and civil officers of the Crown [were] dismissible at will . . . and no petition of right [could] be brought by them to recover pay, pension or other sums to which they claim[ed] to be entitled for their services, or damages in respect of their dismissal. . . .”

It is clear, therefore, that damages cannot be claimed against the Ministry of Defence in this action. Counsel for the plaintiff made reference to s.15 of the Gibraltar Constitution as giving general redress to an aggrieved party but the provisions of the Crown Proceedings Ordinance do not offend s.15 and lie comfortably with it.

Would the court grant declaratory judgments even though damages were not awardable? I think not. So far as the claim in tort is concerned, the Ministry of Defence is not vicariously liable for the actions of an officer of the Gibraltar Services Police. A declaratory judgment against the Ministry of Defence would have no greater force than a judgment against the second defendant, one of its employees. So far as the claim for wrongful dismissal is concerned, if it is still the case that a Crown servant may be dismissed at will the plaintiff’s dismissal cannot be wrongful. If, on the other hand, in these modern days, a Crown servant has redress in respect of his dismissal from service, the plaintiff may have a claim in another tribunal. His counsel says he may go before our own industrial tribunal. Be that as it may, it seems the plaintiff, if he has any redress at all, could also seek redress in the English courts against his employer. In those circumstances declaratory judgments should not lie.

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If I am wrong on all of the above and the Crown is properly sued, then the Ministry of Defence is, in any event, the wrong defendant. By s.12 of the Crown Proceedings Ordinance “civil proceedings by or against the Crown shall be instituted by or against the Attorney-General.”

5 For all of these reasons, I order that the writ of summons be set aside as against the first defendant, the Ministry of Defence. Costs will follow the event.

Order accordingly.