IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON MONTSERRAT

CASE MNIHCV 2017/0032

BETWEEN

MINISTRY OF AGRICULTURE

OFFICE OF THE HON. DEPUTY GOVERNOR OF MONTSERRAT

-and-

ASHEL BRAMBLE

Defendant

APPEARANCES

Ms Renee Morgan for the Claimants. ✓

Mr Sylvester Carrott for the Defendant.

2021: JUNE 25

JUDGMENT

Concerning employee sued for damaging tractor and recovery of monies paid while injured

1 **Morley J**: Ashel Bramble was a tractor driver, without formal contract, for the Government of Montserrat (GoM), who had an accident on 11.04.13, damaged his neck, had an operation, and was paid his full wage and medical costs, plus accommodation and gym expenses on Antigua, during at least three years of apparent recuperation.

a. His income was finally stopped by letter on 21.03.17, he threatened to sue by letter from his lawyer on 03.05.17 complaining he was still unable to work, and it appears in response he was then sued for $200000ec being the value of the tractor, and overpayment of his wage, being about $49000ec, in an action filed by the GoM on 22.12.17.

b. In defence to the suit, Bramble then counterclaimed his wages should continue.

c. Because the tractor had in fact been fixed, the GoM later amended its claim on 31.01.20 to about $5800ec, being merely the cost of repair.

d. In parallel, in February 2019, Bramble, who has previous convictions from 2004, was arrested on suspicion of bringing girls onto Montserrat for prostitution and for bringing in cannabis for sale. He pleaded guilty to various offences and on 27.07.20 was sentenced by this judge to 27 months in prison, and as at today remains in jail.

e. There seems little prospect any monies sought by the GoM will ever be recoverable, as Bramble appears indigent without assets, though notwithstanding, government lawyers have maintained this action, including after countersuit for his wage to keep being paid had been discontinued on 14.10.19.

2 There was a trial on 04.06.21. Evidence was heard from the Jocelyn Hogan, the Director since 2014 of the Human Resources Management Unit (HMRU) within the office of the Deputy Governor, whose witness statement was filed on 14.07.20, and from Daren Greer, plant superintendent since 2008 in the Public Works Department (PWD), also filed same date. Bramble called no evidence, arguing through Counsel Carrott the GoM had failed on the facts to meet the burden of proof.

3 The basis for the GoM claim for the tractor repair is it was argued he drove it negligently; for the recovery of the wages, these are claimed as arising from mistake, leading to unjust enrichment, for which restitution of overpayment is sought.

The tractor repair

4 Concerning the claim for the tractor repair, the GoM has largely pleaded *res ipsa loquitur*, meaning 'the thing speaks for itself' there must have been negligence for there to have been an accident, citing this can be a proper approach based on some case law, essentially reversing the burden of proof onto Bramble to show there was no negligence.

a. In a report received on 08.08.13 Bramble explained, *'the plough was causing the tractor to bounce more than normal so I quickly glanced back...as I would normally do...I normally drive close on my side to avoid the ongoing traffic...I checked the plough...again it was ok, I checked it again just before Environment Health Department, and next thing the tractor fell into the drain'*.

b. By an exhibited report on 09.09.13, Tractor Supervisor Andy Daley (not a witness) said, '*prior to the accident the tractor was checked and tested by me personally before it was handed over to the tractor driver and it was mechanically sound and in good operating condition'.*

c. Counsel Morgan argued every time Bramble looked back he should have stopped the tractor, so not stopping was negligence.

d. In evidence, Greer said he had never driven the tractor, did not know if Bramble had ever been trained, assumed it, the tractor was not insured by the GoM, it does not have rearview or wing mirrors, nor is designed for them, and he had never heard of an employee being sued by the department, further found it odd there was a suit launched four years later, there having been no usual PWD internal 'board of enquiry' to establish any culpability, and for the cost of repairs was relying entirely on what Daley said, not having checked it, nor whether the parts, as to any or all, had come gratis from a derelict tractor.

5 As to the accident its cause is unexplained. No one saw it, except Bramble. There is no explanation, other than Counsel Morgan not being a tractor driver conjecturing Bramble should have stopped every time he looked back, which for a vehicle without mirrors seems not expected, nor is there evidence so stopping has been shown required, and offered as training, nor that glancing back caused the accident. In short, Counsel Morgan cannot meet the burden of proof, absent any evidence of the cause of the accident, so she cannot show on balance negligence by Bramble was probably its cause, acting outside unevidenced, supposed, tractor driving norms, no matter her suspicion.

6 Moreover, in my judgment, this claim has been unrealistic on its facts, in all the circumstances, where the evidence of the cost of the repair is entirely hearsay, against a background of having wrongly claimed for the whole value of the tractor at first, and for more than two years, there being no evidence of training, which if lacking as unproven would likely make the GoM wholly vicariously liable for any accident if Bramble had indeed been negligent, rendering the proceedings academic, while it seems never suing employees anyway.

7 Counsel Morgan's only hope has been to reverse the burden of proof onto Bramble under the *res ipsa* doctrine, as pleaded at para 8 of the amended statement of claim. To do so,

she has relied on **Ng Chin Pui v Lee Chuen Tat** (Privy Council appeal no.1 of 1988), and **McGeough v Thomson Holidays [2007]** EWCA Civ 1509. The case of *Ng Chin Pui* is readily distinguishable on its facts because there in Hong Kong a coach veered to the wrong side of the road, over a grass divide, and collided with a minibus. Driving on the wrong side of the road hitting an oncoming car starkly raises wrong. But here, a tractor slipping into an adjacent parallel drain does not. Similarly the facts in the case of *McGeough*, in part reviewing the Hong Kong case, also had a coach, but in Turkey, veering onto the wrong side of the road and hitting an oncoming car head on. In my judgment on the facts of this case, *res ipsa loquitur* does not arise, whereupon Counsel Morgan is left lacking any positive evidence Bramble was negligent.

8 For this reason, on this analysis of the facts, the claim for the repairs is dismissed.

The overpayment of wages

9 Concerning the alleged overpayment of wages, the facts are as follows.

a. After the accident of 11.04.13 Bramble failed to attend work regularly after and was the subject of warning on 13.08.13, 18.09.13, and 12.11.13, while in parallel he was claiming he had suffered injury.

b. On 09.01.14, Montserrat Chief Medical Officer (CMO) Tracy-Ann Kernanet Huggins in an internal memo recommended GoM pay for Bramble's medical care, requiring Bramble to present a report from his surgeon and physio at the end of a month.

c. On 28.01.14, in a one page letter to the Montserrat Health Ministry (HM), there was a medical report from Dr Joseph John that Bramble required surgery, paid for by GoM, to his neck for stenosis of vertebrae C3-6, needing laminectomy and 6-8 weeks recovery.

d. On 28.05.14, in a one page letter to the Montserrat Ministry of Communications, Works and Labour (MCWL), Dr John reported Bramble had a laminectomy for *'severe prolapse of vertebrae L4-5'*, (very different from C3-6), and will be unable to work until 06.08.14.

e. On 19.08.14, in a one page letter to the MCWL, Dr John reported Bramble would be unable to work until 29.09.14.

f. On 26.08.14, in a one page letter 'to whom it may concern' (TWIMC), physio Christine Gillis Gerard reported Bramble required physiotherapy and guided exercises, needing a gym coach.

g. On 07.11.14, in a one page letter to Dr John, physio Gerard reported an intense progam for Bramble, recording *'left side is still weaker than the right side and has less endurance, there are still several nerve symptoms like occasional spasms and twinges in the limbs or stiffness, some areas have a disturbed skin sensitivity (strange sensation when washing hands)'*, no symptoms appearing objectively observable, asking Dr John how long will recuperation require, though the letter is not marked seen by the HRMU until 02.03.15.

h. On 16.12.14, in a one page letter to the CMO, Dr John reported the laminectomy was to C3-6, and signed him off work until the end of January 2015.

i. On 16.12.14, in a one page letter to the Montserrat Ministry of Finance and Economic Management (MFEM), Kelvina Francis recommended Bramble continue to use her gym with coach on Antigua.

j. On 08.02.15, in a two page letter TWIMC, physio Gerard opined *'it will be a very long term rehab program'*, requiring she does physiotherapy for 3 days a week for at least the next three months.

k. On 25.05.15, in a one page letter TWIMC, physio Gerard reported Bramble resumed physiotherapy after an *'interruption of four months'*.

l. On 09.09.15, in a one page letter TWIMC, the CMO reported Bramble would require another year of care by Dr John and physio Gerard.

m. On 20.11.15, in a one page letter TWIMC, physio Gerard reported a further *'long interruption'*, confirming *'he is going to suffer from permanent damage'*.

n. On 31.12.15, in a one page letter TWIMC, physio Gerard calls for a *'thorough neurological assessment'* of symptoms being reported by Bramble.

o. On 05.05.16, in a one page letter TWIMC, Dr John reports Bramble re-examined on 04.05.16 and cleared to return to work in September 2016, though this letter was not seen by HMRU until sought by email to Adina Lee from Dr John on 21.03.17.

p. On 01.06.16, in a two page letter TWIMC, physio Gerard re-examined Bramble on 18.05.16 and said he was able to resume work, but not to drive heavy duty equipment, though this letter was not seen by HMRU until sought by email to Adina Lee from the physio on 07.03.17.

q. On 21.03.17, in a one page letter to Bramble, Phillip Chambers as Chief Human Resources Officer ceased Bramble's salary and benefits.

r. On 03.05.17, in a two page letter to Chambers, Counsel Fitzroy Buffonge asked for the salary to be reinstated with call for a detailed assessment by a neurosurgeon.

s. On 14.08.17, in a two page letter to Chambers, Counsel Carrot warned of suit if the salary was not reinstated, owing to persisting remnant of injury found on 09.06.17 by Dr Singh, reporting MRI scan showing herniation of C5-7 with posterior osteophytes.

t. On 22.12.17, the GoM launched its suit for recovery of the money paid to Bramble between September 2016 and March 2017, being about $49000ec.

u. On 10.02.18, in a detailed four page neurosurgical expert report TWIMC, Dr Sean Smith on Barbados reviewed Bramble's injury, recording *'Bramble suffered a spinal cord injury at the C6/7 region, this is responsible for his current complaints, he has made a remarkable recovery and is able to function independently but not completely normally. There does not appear to be further surgery which would help him at this time. However with an injury of this extent it is not surprising that he experiences some deterioration with cessation of all rehabilitation, [though] should be employable [but not] tractor driving.*

10 During much of 2016, Hogan was absent in the UK, with HMRU being run by Daphne Cassell and Phillip Chambers. When back, in February 2017 Hogan found Bramble in the HMRU building, expecting him to be in Antigua, asked him how he was and was told to speak to him only though his lawyer. This raised suspicions and at this point the note from Dr John on 05.05.16 and from physio Gerard of 01.06.16 were sought. Learning according to Dr John he had been fit for work from September 2016, his income was stopped, and by December 2017 the suit was sanctioned.

11 Distilling the evidence, it is remarkable that so much money was being paid to Bramble, being Montserratian, not even on a formal employment contract, for so long, based on brief memos, and passing letters from medics with such little detail, never much more than a page, chaotically addressed and for a time not gathered by HMRU. It appears he received his income, plus accommodation and gym expenses to recover on Antigua, while his ongoing medical bills were settled, as arising from regular review and physiotherapy from at least January 2014 through to March 2017, all unarguably running to several hundred thousand EC. The potential for malingering and 'playing the system' is obvious, notably

when considering Bramble's criminal activities. *Obiter*, it might be said the GoM should be more careful with its money, the bulk coming from the UK taxpayer; it does not grow on trees.

12 The complaint raised by Counsel Morgan is that Bramble was not entitled to monies after being said by Dr John on 05.05.16 fit for work from September, so that it was a 'mistake' to pay him, and his failing to report himself for work was 'abandonment of post' and therefore perhaps a form of constructive resignation, meaning he should have not have been paid from then.

13 In learned submissions of 18.09.20, Counsel Morgan has argued:

> **The Law**
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> 11. The Government of Montserrat has made its claim for restitution on the basis of the law of unjust enrichment. This claim encompasses the old common law claim for money had and received.
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> 12. The law of unjust enrichment or restitution has recently been recognized and developed in the common law. The author Ewan McKendrick has cited Lord Goff in ***Lipnik Gorman v Karnale*** as saying that this claim is a claim of right:
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> > The recovery of money in restitution is not, as a general rule, a matter of discretion for the court. A claim to recover money at common law is made as a matter of right; and even though the underlying principle of recovery is the principle of unjust enrichment, nevertheless, where recovery is denied, it is denied on the basis of legal principle.
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> 13. The learned author further continued that:
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> > Restitution scholars have often recognized that there are four distinct stages to a restitutionary claim. At the first stage, the defendant must be enriched; at the second, it must be shown that the enrichment was 'at the expense of the plaintiff'; third, it must be shown that there is an 'unjust factor', that is to say, there is some identifiable and principled basis upon which it can be said that the continued retention of the benefit by the defendant is unjust; finally, consideration must be given to whether any defenses exist, either in whole or in part, to the restitutionary claim.
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> 14. The Court should find for the Claimants if the Claimant can prove to the Court, on a balance of probabilities that:
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> > (1) The Defendant was enriched;

(2) This enrichment was at the expense of the Claimants;
(3) There was an unjust factor;
(4) There are no applicable defenses;

The Government's Case

15. The Government's case is that the Defendant was enriched by the payment of monies to him during the months from September 2016 to March 2017, being salary, maintenance, apartment rental and such benefits.

16. This enrichment was clearly at the Government's expense.

17. This payment was made under mistake of fact or law, which is an unjust factor

18. On the evidence presented, there were potentially several mistakes:

(1) Mistake that the Defendant was still authorized to be off duty, fostered by ignorance of the medical reports of May and June 2016 that said that the Defendant should return to work in September 2016;

(2) Mistake that the Defendant was still a public officer, in ignorance of the fact that by operation of section 30 of the Public Service Act, coupled with the fact that the Defendant was off duty without authorization, the Defendant was by statute deemed to have abandoned his post, noting:

> **Section 30 Public Service Act** states:
> " *(1) An officer who is absent from duty without leave for a continuous period of one month, unless declared otherwise by the Deputy Governor, is deemed to have resigned his office and thereupon the office becomes vacant and the officer ceases to be an officer.*
> *(2) An officer who is absent from Montserrat without permission is liable to summary dismissal.*"

(3) Alternatively mistake that the Defendant's contract of employment had not been frustrated;

(4) Alternatively mistake in failing to recognize that the Defendant was absent without leave or support for such leave and therefore not entitled to be paid a salary in accordance with General Order 610 of the General Orders for the Public Service which states:

> "*An officer who absents himself from his duty without leave, or without an acceptable excuse, fails to resume duty when he is due to do so, will be regarded as absent without permission and will not be entitled to salary during his absence...*"

19. The evidence presented shows that from the period September 2016 to March 2017 there was no medical support for the Defendant being off duty. The Government has said,

and the Defendant has not denied, that the Defendant received medical reports instructing him to return to duty and did not pass these on to the relevant Government officers.

20. The Government says that in such circumstances money paid to the Defendant was paid under mistake, as by virtue of section 30 of the Public Service Act or General Order 610 the Defendant ought not to have received these monies.

21. Alternatively, the Government says that it was not recognized that the employment contract was frustrated.

22. There are no applicable defenses presented by the Defendant. The Defendant has not said that he has given consideration for the payments. The Defendant has not indicated that he has changed his position. If he has, it is clearly in bad faith as he knew that he was not authorized to be off duty and had not passed on the relevant information, but continued to receive funds which had been made available for the purpose of his seeking medical treatment.

14 This is all intelligent legal argument. However, on the facts, was there 'mistake', and was there 'abandonment of post'?

15 The obvious response on the facts to the analysis of Counsel Morgan is Bramble still considered himself ill; just because a doctor may have said he was fit to work does not mean Bramble agreed, noting the neurosurgeon Dr Smith does identify a persisting injury, while there is little medical detail to justify Dr John returning him to work after so long off it, so that Bramble not volunteering for work is capable of being a completely reasonable response in the context of his persisting symptoms and such a reliably open chequebook to maintaining him on Antigua. There is nowhere evidence he was required to report what the doctor said, and *a fortiori* where HMRU had set up a direct line of communication with Dr John and physio Gerard, not relying on Bramble, it seems from at least March 2014, gathering reports directly and through the CMO, (though as above light on detail and indistinctly addressed). This makes sense as Bramble was always unlikely to be wholly reliable as to self-reporting, noting his obvious inconsistency even in attending treatment. And then what happened was HMRU did not collect any report for 2016 from the two medics until March 2017, perhaps owing to staff absences and changes.

16 What this means is I find the GoM intended to pay Bramble, as it did, until informed otherwise, not by Bramble, which it was, though in March 2017. It was not a mistake to pay him from September 2016; it is a regret.

17 The regret is HMRU did not gather the medical reports when they should. In this sense, Bramble's situation is perhaps similar to being an employee about whom there was no appraisal at the required time, which would have led to sacking, but instead later, where the decision to sack him is then backdated to when the appraisal should have taken place, with demand money be repaid received after when the appraisal should have happened. Intrinsically that would be wrong. Bramble was constructively sacked on 27.03.17, not before. His extraordinary income remained legitimate between September 2016 and March 2017 and the regret is wholly the fault of the GoM. I make no comment on whether Bramble should ever have been paid so much for so long in the first place, but having set up such a strikingly generous circumstance, it cannot be Bramble's fault if he relied on it.

18 It follows the factual basis is wrong upon which Counsel Morgan has offered to apply her intelligent legal analysis of the law. Constructive resignation and mistake do not arise. Instead this case is about bad management of an arguably over-generous and unmonitored benefit to an unreliable recipient, who had grounds not to accept what the doctor said, and about whom there is no evidence there were ever written or clear terms he must report himself for work if the doctor says when he does not accept it.

19 In sum, this case has turned on its facts, not the law. Counsel Morgan cannot meet the burden on the facts to show on balance Bramble should pay back the money, and so her claim for the $49000ec is dismissed.

20 The question of costs arises. The GoM has lost. There is a good argument this litigation has been misconceived, all the while there being no meaningful cost of it to the GoM who have deployed salaried lawyers. The suit was always academic as realistically Bramble would never have been in a position to pay. There may be an element the suit was punishment for being thought cheeky when Bramble had warned of suit for his salary to continue having taken the overgenerous GoM 'for a ride' for so long. What is troubling is there here appears a dogged pursuit of now a prisoner wrongly for the whole value of a tractor for two years, and in addition for monies regretted paid due to administrative flaw at HMRU. The litigation seems to have been a contest between legality and reality, pursued because it can be, rather should be, in theory legally sound but factually unrealistic. Through the case Counsel Carrott has assisted Bramble, in more than three years of litigation, including before the Master, though knowing Bramble indigent, which is to the

credit of Counsel. It is only right Counsel Carrott recovers some costs, which I therefore award. The sum shall be $8205ec, sought as prescribed costs, which seem modest for the work done.

21 Before concluding it should be noted the quality of argument on the law in this case has been very high, with excellent written submissions, all to the considerable credit of both counsel, particularly Counsel Morgan, though perhaps with the reminder please to keep more of an eye to the realities.

The Hon. Mr. Justice Iain Morley QC
High Court Judge
25 June 2021