IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES

IN THE HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV 2017/0463

BETWEEN:

INDRA WILLIAMS

Claimant

AND

CASEPAK COMPANY (GRENADA) LTD.
(Trading as Calabash Hotel)

Defendant

Appearances:

Mr. Ruggles Ferguson of Ciboney Chambers of Counsel for the Claimant
Ms. Skeeta Chitan of Mitchell & Co. of Counsel for the Defendant
The Claimant and the Defendant's representative Mr. Russell Antoine being present.

2018: May 25; 30.

Civil Procedure - Striking out of part of claim - No reasonable ground for action - Whether defective pleadings curable - Part 26-3 of CPR 2000 - Employment Law - Unfair Dismissal - Right of access to the High Court - Whether an employee can initiate an unfair dismissal claim for damages in the High Court - Part 9.7 of CPR 2000 - Disputing court's jurisdiction

[1] **DYER, J. (Ag):** By an application dated 12th December 2017 the Defendant applied to the Court for: (i) a declaration that this Court does not have jurisdiction to try the Claimant's unfair dismissal claim; (ii) an order that the Claimant's wrongful dismissal claim fails to meet the requirements of a wrongful dismissal claim in law; and (iii) an order striking out the entire claim at bar; and (iv) costs. The Defendant's application was made pursuant to **Rules 9.7 and 26.3 of the**

Civil Procedure Rules 2000 ("CPR 2000"). This application was opposed by the Claimant who filed a Notice and Submissions in Opposition on the 12th January 2018 and 9th February 2018 respectively. The application at bar came on for hearing on the 25th May 2018.

[2] A brief background to the case as gleaned from the pleadings will present a helpful perspective from which to consider the application at bar. It is the Claimant's case that on 11th October 2014 after the Claimant had been employed with the Defendant for approximately 25 years, the Defendant summarily dismissed her. At the time of the Claimant's dismissal she was a member of the Grenada Technical and Allied Workers Union ("GTAWU"). It appears that she had joined the GTAWU because she was aggrieved by the Defendant's decision in November 2013 to reschedule her to do shift work. Upon joining GTAWU she apparently requested that it negotiate with the Defendant on her behalf. The negotiations were apparently unsuccessful and the Claimant was put on shift work. The Claimant was shortly thereafter presented with a document titled duty of confidentiality which she was asked to sign by a certain deadline. She did not sign the document within the time limited by the Defendant. She sought the advice of the GTAWU on the matter. The GTAWU intervened. The Defendant subsequently issued various letters to the Claimant complaining about her performance. The Defendant by way of letter dated 10th October 2014, but delivered on the following day, informed the Claimant that she was being immediately dismissed. The Claimant was only paid following her termination for the days on which she actually worked.

[3] The Claimant was dissatisfied with this and made a complaint to the Labour Commissioner who after hearing both sides recommended that the Defendant pay the Claimant severance pay. The Defendant rejected this recommendation. The dispute was referred to the Minister of Labour. The Minister it seems proposed the same compromise as the Labour Commissioner which the Claimant was seemingly prepared to accept but the Defendant rejected.

[4] There is a dispute between the parties as to what happened next. It will later become apparent that, as Ms. Chitan submits, nothing turns on this. The Claimant avers that the Minister invited the parties to agree on the establishment of an Arbitration Tribunal. The invitation was verbal and not in writing. The Claimant maintains that this invitation was rejected by the Defendant who, through its counsel, by letter dated 7th November 2017 confirmed its rejection of the Minister's invitation.

[5] The Defendant denies this. The Defendant avers that the said letter did not communicate any decision by it to either participate or not participate in the setting up of the Arbitration Tribunal. The Defendant says that the letter simply underscored its right of refusal which was in no way being exercised. The Defendant's letter was in response to a letter from the Claimant's counsel dated 31st October 2017 requesting that the Defendant indicate whether it was amenable to paying certain sums in full and final settlement of the matter. The sums included the sum of $114,787.75 which had been recommended by the Labour Commissioner and the Minister as severance pay. The Defendant was not minded to do so. It took the position that the Labour Commissioner and the Minister are not empowered to make any ruling regarding the matter unless they were invited to do so by the parties. The Defendant had not invited either the Labour Commissioner or the Minister to make any such ruling. It was as such entitled to disagree with the recommendations of both offices.

[6] On 9th November 2017 the Claimant commenced proceedings before this Court challenging her dismissal on the ground that it was in breach of her contract of employment and unreasonable and that it amounts to wrongful dismissal under the common law and to an unfair dismissal within the meaning of **section 70 of the Employment Act, Cap 89 of the 2010 Edition of the Continuous Revised Laws of Grenada.** The Claimant seeks *inter alia* damages for unfair dismissal.

[7] The Defendant acknowledged service on the 27th November 2017. On the 12th December 2017 the Defendant applied:-

(i) pursuant to **Rule 9.7 of the CPR 2000** for a declaration that this Court lacks jurisdiction to hear the Claimant's unfair dismissal claim on the ground that **section 82 of the Employment Act 1999** specifically sets out the procedure and mechanisms for determining complaints of unfair dismissal. The Defendant avers that the Claimant is required to prosecute her claim for unfair dismissal in accordance with the legislative dictates in **section 82 of the Employment Act** and is not entitled to seek redress from the High Court unless upon an application for judicial review or appeal of the decision of the Arbitration Tribunal. There is no such ruling of the Arbitration Tribunal capable of being reviewed by this Court, which is the only jurisdiction this Court has in unfair dismissal claims in Grenada;

(ii) pursuant to **Rule 26.3 of the CPR 2000** to strike out the wrongful dismissal claim on the basis that it is unmaintainable as it fails to disclose any reasonable grounds for bringing the wrongful dismissal claim. The Defendant avers that the Claimant has failed to plead the particulars of her employment contract and has failed to plead the particulars of its breach(es) which are necessary to establish a wrongful dismissal action.

[8] Having filed its Notice of Application to strike out, the Defendant did not file any defence to this action.[1]

[1] In **St. Kitts Nevis Anguilla National Bank Limited v. Caribbean 6/49 Limited Civil Appeal No. 6 of 2002** our Court of Appeal held that an application under Part 9.7 of CPR 2000 if made within the period for fiing a defence, operates as a stay of proceedings until the application is heard and determined. Georges JA opinied that this view is reinforced by paragraph 7(b) of Part 9.7 which stitpulates that: "*If on application under this rule the court does not make a declaration, it ... (b) must make an order as to the period of fiing a Defence."* Further, paragraph 8 provides that if a defendant makes an application under this rule the period for filing a Defendance is extended until the time specified by the Court under paragraph 7(b).

The Pleading Point - *Whether striking out of the Claimant's wrongful dismissal claim is appropriate*

[9] This Court is empowered by **Rule 26.3 of CPR 2000** to strike out a statement of case or part of a statement of case if it appears that it does not on its face disclose a sustainable claim. In **Jannis Reynold-Greene v. The Bank of Nova Scotia et al** Claim No. ANUHCV 2005 0488/0489 Blenman J (as she then was) held that the "*no reasonable ground for cause of action" addresses two situations:-*

(1) where the content of the statement of case is defective in that, even if every allegation contains in it were proved, the party whose statement of case it is cannot succeed; or

(2) where the statement of case, no matter how complete and apparently correct, it may well fail as a matter of law.

The cases establish that striking out is a draconian step which should only be applied in sparingly limited, plain and obvious cases where there is no point in having a trial. Indeed, in **Global Torch Ltd v. Apex Global Management (No. 2)** [2013] EWHC 2818 (Ch) Norris J said "*striking out of a statement of case is one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified*." A court is slow to drive persons from the seat of justice and as such usually errs in favour of having cases tried on their merits. The Court's power is thus regarded as restricted to cases which are bad in law or which fail to plead a complete claim.

[10] The Defendant in this case does not assert that the wrongful dismissal claim is bad in law. It essentially avers that the Claimant has failed to properly particularize same. The strikeout application at bar is thus based on the first limb of Blenman J's proposition. It is therefore necessary to look closely at the statement of claim. Having reviewed same, I see force in the Defendant's criticism

that the Claimant's wrongful dismissal claim is lacking with regard to the particulars of the alleged breach of contract. Firstly, the pleadings do not say which term of the contract has been allegedly breached. Secondly, whilst the Claimant takes issue with her "immediate dismissal" no contractual period of notice is pleaded by the Claimant. The absence of such material details in my view makes the pleading defective. In **Robert Conrich (a.k.a Bob Conrich) v Ann Van Der Est** AXAHCV 0002/2001, Rawlins J (as he then was) stated that it is only where a statement of case does not amount to a viable claim or is beyond cure that the Court may strike it out. The question which arises is whether such defects are beyond cure.

[11] The Claimant being faced with the strikeout application at bar did not seek to stave same off by applying for leave to amend to cure the defects in her pleading. She filed a Notice of Opposition wherein she essentially argued that she was summarily dismissed and there was no cause to justify such dismissal. The Claimant further averred that at common law, even in the absence of a written contract, an employee is entitled to reasonable notice before termination. It is of note that nowhere in the pleadings was there any assertion by the Claimant that: (i) her claim is based upon an oral contract, (ii) she was nonetheless entitled to reasonable notice, and/or (iii) that the Defendant had failed give such reasonable notice before her dismissal.

[12] At the hearing, the Claimant's counsel Mr. Ferguson initially argued that the pleadings were not defective and that it was "*question of style*". This Court was however of the view that the Defendant's criticism was not without merit. The Court was also of the view that the pleaded matters although defective could nonetheless properly form the basis of a cause of action for wrongful dismissal which could proceed to trial if leave were granted to amend same to plead the particulars of the Defendant's alleged breach. In short, the pleading defects could be cured through amendment. I accordingly ruled that the ultimate sanction of striking out was not appropriate in the circumstances of this case and that a lesser

sanction was more proportionate. I granted the Claimant leave to amend her wrongful dismissal claim within 14 days of the hearing date.

The Jurisdiction Point

[13] The other issue which falls to be determined on the application at bar is whether there is a right of access to the High Court to seek redress for contravention of the right not to be unfairly dismissed.

Parties' submissions

[14] In her submissions, counsel for the Defendant, Ms. Chitan, submitted that unfair dismissal does not exist as a concept of common law but was created and introduced into the field of employment law by statute. Ms. Chitan relied on the Court of Appeal decision in **Byron Smith v. British Virgin Islands Electricity Corporation** Civil Appeal No. 10 of 2008 and contended that an aggrieved employee who claims to be unfairly dismissed must therefore follow the procedure set out in the **Employment Act 1999** to seek redress. She maintained that the procedure is a three-tiered one starting with a complaint to the Labour Commissioner. If the Labour Commissioner fails to settle the dispute, then it is referred to the Minister. If the Minister fails to settle the dispute, then it is referred to an Arbitration Tribunal. Ms. Chitan contends that in **Byron Smith** the Appellant reached up to tier number 2 of the three-tiered statutory process and opted to bring a high court action for damages for unfair dismissal like the Claimant in the case at bar. The Learned Master struck out Byron Smith's claim for unfair dismissal on the ground that conciliation is the only remedy for unfair dismissal under the provisions of the BVI Labour Code (which Ms. Chitan says mirrors the Grenada Employment Act) so that there was no right of action which could be redressed in the High Court. This decision was upheld by the Court of Appeal which confirmed that Byron Smith was limited to the redress laid out in the Labour Code and was precluded from bringing an unfair dismissal suit in the High Court.

[15] Ms. Chitan further submitted that even if this Court has jurisdiction to entertain an unfair dismissal claim, which she says it does not, the Claimant in this case cannot seek damages for unfair dismissal as this is not an available remedy under the Employment Act. In short, Ms. Chitan relied on the decision on **Byron Smith** which she says is binding on this Court and submitted that this court lacks jurisdiction to hear and determine an unfair dismissal claim. Ms. Chitan contended that the Employment Act could have very well been extended so as to include the court's jurisdiction to hear such complaints but it did not. Instead it specifically set out who should hear such complaints and what remedy is available to such a complainant.

[16] In his submissions, the Claimant's counsel Mr. Ferguson submitted that the Minister does not have jurisdiction under **section 45 of the Labour Relations Act** to refer to arbitration a dispute related to the alleged unfair dismissal of an employee in a non-essential service where a party to the dispute has exercised its right to reject the Minister's invitation to refer the dispute to an arbitration tribunal. This is disputed by Ms. Chitan who maintained that the participation of both parties is not required for the constitution of the Arbitration Tribunal or the hearing of the employment dispute.

[17] Mr. Ferguson relied on the Court of Appeal decision in **Burrill and Another v. Schrader and Another** [1991] 50 WIR 203 and submitted that a person has a common law right to access the court to enforce common law and statutory rights and it would require clear words to oust the jurisdiction of the court. Mr. Ferguson submitted that this decision is a highly relevant one in that in **Burrill** the issue for the Court was whether an employee was required to exhaust the conciliation procedure prescribed under the BVI Labour Code before instituting a claim for breach of the statutory right not to be unfairly dismissed. The Court of Appeal according to Mr. Ferguson held that what the Labour Code did was to create a new statutory right and prescribe an alternative procedure to court proceedings for

enforcing the right but there is nothing in the Act that indicated an intention to oust the jurisdiction of the Court.

[18] Mr. Ferguson further averred that there is nothing in the wording of **section 45** or any other section of the **Labour Relations Act** or **the Employment Act** (both referred to as "the **Labour Code**") which indicates that Parliament intended to deprive the Court of jurisdiction to hear and determine a claim arising from a dispute in a non-essential service if the conciliation and mediation process failed to bring about a resolution. Mr. Ferguson argued that with regard to non-essential services, the parties have the option to go to arbitration if there is mutual agreement but they cannot be compelled. He urged this Court to find that the obvious intention of Parliament is that Parliament viewed arbitration as an optional remedy not an exclusive one. Mr. Ferguson further submitted that an interpretation which holds the Court has no jurisdiction following a failure to achieve mutual agreement to refer a dispute to arbitration would lead to the absurd result that an employer who has unfairly dismissed an employee can deprive the employee of a remedy by simply refusing to settle before the Labour Commissioner and Minister and then refusing to go to arbitration. Mr. Ferguson says that such a result would frustrate the purpose of Parliament which is to provide a remedy for unfair dismissal.

Discussion

Statutory Framework

[19] It is common ground that in Grenada the legal principles that relate to unfair dismissal are grounded in statute. Mr. Ferguson conceded at the hearing that they are contained in the Employment Act. The relevant provisions are as follows:-

> **Section 76** states that "*A dismissal is unfair if it is not in conformity with* ***section 74*** *or is constructive dismissal pursuant to* ***section 80***."

Section 82 provides the procedure for complaints of unfair dismissal and states as follows:-

(1) *Within three months of the date of dismissal, an employee shall have the right to complain to the Labour Commissioner that he or she has been unfairly dismissed, whether notice has been given or not.*

(2) No complaint under this section may be made by an employee who has been dismissed during the probationary period or has reached the normal retirement age for employees employed in his capacity.

(3) The right of an employee to make a complaint under this section shall be without prejudice to any right an employee may enjoy under a collective agreement.

(4) Where the Labour Commissioner fails to settle the matter it shall be referred to the Minister who shall hear the matter as soon as it is practicable.

(5) Where the Minister fails to settle the matter it may be referred to an Arbitration Tribunal."

[20] The sole issue for determination on the Part 9.7 application at bar turns on the interpretation of a statute. This approach is consistent with Henry J's approach in **Alicia Sardine Browne v. RBTT Caribbean Limited** SVGHCV2016/0520 where the issue whether a claim for unfair dismissal can be initiated in the High Court was canvassed before the St. Vincent Court. Henry J posited therein that Mrs. Browne's claim for unfair dismissal must be dismissed if the Act establishes the dispute mechanism as the sole mechanism to pursue a claim for unfair dismissal. She held that an examination of the applicable provisions of the Act is necessary to resolve this issue. The St. Vincent Court having reviewed the relevant statutory provisions held that by using the compulsory word "*shall*" to govern the dispute

procedure in Part IV and particularly in section 35(1) of the Act, the legislature had imposed a statutory obligation on employers and employees alike, to utilize the mechanism outlined whenever they allege that the other party has not complied with the Act. Henry J accordingly found that the High Court did not have jurisdiction to hear the unfair dismissal claim.

[21] At the hearing, Mr. Ferguson essentially submitted that the **Alicia Sardine Browne** case and the BVI cases cited by the parties are distinguishable as the jurisdiction issue arose in a different statutory context. He maintained that those cases were in any case decided on their own peculiar facts. Mr. Ferguson essentially contended that the Grenadian Labour Code departs from traditional unfair dismissal statutes in that the dispute procedure under **section 45 of the Labour Relations Act** is not mandatory. Having reviewed both **section 45(4)** and also **section 82(5) of the Employment Act**, I accept that (contrary to Ms. Chitan's submission) the arbitration process under the Labour Code is consensual where the dispute is in relation to a non-essential service. As such (unlike where the dispute is in relation to an essential service) the Minister cannot decide to establish an Arbitration Tribunal and determine its composition and terms of reference in his own discretion if the consent of both the employer and employee cannot be obtained. I accordingly do not accept Ms. Chitan's submission that the BVI Labour Code mirrors the Grenada Employment Act. This is to my mind a most significant departure.

[22] Mr. Ferguson also conceded that there is no express provision in the **Labour Code** which empowers this Court to award damages for unfair dismissal. Mr. Ferguson relied on **Burrill** and argued that this is not fatal as the Claimant should not be left without a remedy in such a situation. He posited that in all the cases relied upon by the parties the employee had remedies available to him or her but chose not to pursue them. The Claimant in this case he says has exhausted all of her remedies and should not be left without a remedy in a situation such as the instant where the Defendant has refused to consent to arbitration. Mr. Ferguson

submitted that where the statutory provisions fall short of providing a remedy, the Claimant has no recourse but to come to the Court.

[23] Whilst this argument is attractive, it is of note that the **Burrill case** was considered by our in Court of Appeal in **Bryon Smith v. British Virgin Islands Electricity Corporation**. Hariprashad-Charles JA (as she then was) who delivered the majority decision held that **Burrill** left the question open and did not decide whether there is a right of access to the High Court to seek redress for contravention of the right not to be unfairly dismissed. She noted that it was interesting to observe that in **Burrill,** Sir Vincent said:

> "*The Labour Code Ordinance provides no remedy by way of compensation for an employer's breach of his employee's statutory right not to be unfairly dismissed. The Labour Code merely provides for conciliation which I would hesitate to classify as a remedy*."

[24] It is also of note that unlike the BVI Labour Code, **section 83 of the Employment Act** at bar which was seemingly overlooked by both Learned Counsel makes express provision for relief by way of compensation for unfair dismissal. This is another significant departure from the BVI Labour Code. **Section 83** provides as follows:-

> *"83.* ***Remedies for Unfair Dismissal***
>
> *(1) If* ***the Arbitration Tribunal*** *determines that an employee's complaint of unfair dismissal is well founded it shall award the employee one or more of the following remedies:*
>
> - *(a) if the employee requests, an order for reinstatement where the employee is to be treated in all respects as if he had never been dismissed;*
> - *(b) an order for re-engagement whereby the employee is to be engaged in work comparable to that in which he was engaged prior to his dismissal, or other reasonably suitable work, from such date and on such terms of employment as may be specified in the order agreed by the parties;*

- *(c)* ***an award of compensation*** *as specified in subsection (4).*

(2) ***The Arbitration Tribunal*** *shall, in deciding which remedy to award, first consider the possibility of making an award or reinstatement or re-engagement, taking into account in particular the wishes of the employee and the circumstances in which the dismissal took place, including the extent, if any, to which the employee caused or contributed to the dismissal.*

(3) Where ***the Arbitration Tribunal*** *determines that the employee caused or contributed to the dismissal to any extent, it may include a disciplinary penalty as a term of the order for reinstatement or re-engagement.*

(4) ***An award of compensation*** *shall be such amount as* ***the Arbitration Tribunal*** *considers just and equitable in all the circumstances having regard to the loss sustained by the employee in consequence of the dismissal in so far as that loss is attributable to action taken by the employer, and the extent, if any, to which the employee caused or contributed to the dismissal.*

(5) The amount awarded shall not be less than two week's pay for each year of service for workers with less than two years of service and one month's pay for each year of service for workers with more than two years of service and an amount additional to such loss may be awarded where dismissal was based on any of the reasons set out in section 74(2).

(6) Where ***the Arbitration Tribunal*** *has made an award of reinstatement or re-engagement and this is not complied with by the employer, the employee shall be entitled to a special award of an amount equivalent to twenty-six weeks' wages, in addition to a compensatory award under subsection (4)."* (My emphasis)

[25] The mandate is however expressly given by Parliament to the Arbitration Tribunal and **not** to this Court to grant the relief which the Claimant seeks. I must therefore respectfully disagree with the submission of Learned Counsel Mr. Ferguson that there is nothing in the Labour Code which indicates an intention to oust the jurisdiction of this Court. As stated above, the concept of unfair dismissal is a statutory one. It is common ground that the remedies available are regulated by the Employment Act. **Section 83 of the Employment Act** tellingly **only** empowers the Arbitration Tribunal to grant the statutory remedies available for unfair dismissal. As unfair dismissal is a statutory concept, this Court finds that

section 83 unequivocally discloses a legislative intention that only the Arbitration Tribunal is to have jurisdiction to award remedies for unfair dismissal. Mr. Ferguson's concession at paragraph 22 is thus fatal in light of section 83. But I will return to this.

[26] The gravamen of Mr. Ferguson's submission was that the Claimant in the circumstances of this case should not be left without a remedy. In my view, this was a matter for the legislature in enacting the Employment Act. As Hariprashad-Charles JA noted in **Bryon Smith** "*[t]he court cannot disregard the legislative intention whether or not the new procedures appear to be inadequate or unsatisfactory*." It may however be appropriate in the circumstances for Parliament to have a second look at the Labour Code.

Conclusion

[27] I hold therefore that as a matter of construction of section 82 of the Employment Act read in the context of the other provisions of the Employment Act and in particular section 83, this Court does not have jurisdiction to entertain any complaint brought in respect of an unfair dismissal even where the complaint is connected to a trade dispute in a non-essential service.

Order

[28] In summary, based on my findings and conclusions above I order as follows:-

1. Leave is granted to the Claimant to amend her wrongful dismissal claim on or before 8th June 2018.

2. The amended wrongful dismissal claim is thereafter to proceed in accordance with CPR 2000.

3. The unfair dismissal claim is hereby struck out pursuant to Rule 9.7(6)(c) of the CPR 2000 on the ground that this Court does not have jurisdiction to try same.

4. The Claimant is to bear the Defendant's costs of this application which are to be quantified on application if they are not agreed within 21 days of today's date.

[29] The Court is grateful to Learned Counsel for the parties for their submissions.

Jean M. Dyer
High Court Judge (Ag.)

By the Court

Registrar