IN THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

SLUHCV2018/0192

BETWEEN:

TONY KISNA

Claimant

and

(1) COCONUT BAY MANAGEMENT LIMITED
(2) COCONUT BAY BEACH RESORT & SPA – ST. LUCIA

Defendants

SLUHCV2018/0193

BETWEEN:

BERTRAND STEPHEN

Claimant

and

(1) COCONUT BAY MANAGEMENT LIMITED
(2) COCONUT BAY BEACH RESORT & SPA – ST. LUCIA

Defendants

SLUHCV2018/0194

BETWEEN:

DENNIS BOITNOTT

Claimant

and

(1) COCONUT BAY MANAGEMENT LIMITED
(2) COCONUT BAY BEACH RESORT & SPA – ST. LUCIA

Defendants

Appearances:
Mrs. Maureen John–Xavier for the Claimants
Mr. Ramon R. Raveneau for the Defendants

2018: October 3rd
December 12th

DECISION

[1] SMITH J: Coconut Bay Management Limited and Coconut Bay Beach Resort & Spa – St. Lucia ("the defendants"), have applied to strike out three separate claims filed by Tony Kisna, Bertrand Stephen and Dennis Boitnott ("the claimants"), on the basis that they are in breach of section 455 of the Labour Code[1] (the Code).

[2] The defendants had, for different reasons, dismissed the claimants. Mr. Stephen filed a claim for unfair dismissal. Mr Kisna filed a claim for unfair dismissal and wrongful dismissal. Mr Boitnott filed a claim in negligence and for unfair, wrongful and constructive dismissal. The dismissals were based on different facts, but the strikeout applications are all based on section 455 of the Code and the claimants' responses are substantially the same. For this reason, the Court agreed that the three applications could conveniently be heard together. The Court also agreed, at counsels' request, to determine the applications on written submissions.

[3] The grounds of the defendants' application are as follows:

1. "Section 455 of the Labour Code mandates that applications to any court for redress for any alleged contraventions of the said Code can only be made after a complaint has been made to the Labour Commissioner or to the Tribunal.
2. That the claim filed on April 19, 2018 alleges several breaches of statutory duty including breaches of section 140 (natural justice) and allegations of Constructive dismissal (section 132 of the Labour Code).
3. That at no time has a complaint been made through the Labour Commissioner or Labour Tribunal for the purpose of dealing with this dispute.
4. That the Labour Code transferred original Jurisdiction with respect to dealing with all employment disputes to the Labour Commissioner and Labour Tribunal, this court is therefore not competent to exercise its jurisdiction in this matter at bar at this time.

[1] Chapter 16.04 Revised Laws of Saint Lucia 2013

5. Having not first made the complaint through the Labour Commissioner, the claim herein is a nullity.
6. The court has the Jurisdiction at any stage of the proceedings to intervene and either stay, strike out or case manage any matter which may come before it."

[4] The Claimants oppose the application on the basis that:

(1) The defendants are in breach of rule 9.7 of the Civil Procedure Rules 2000 ("CPR") and are deemed to have accepted the Court's jurisdiction.

(2) Since the claimants' claims include the tort of breach of statutory duty, they may, under section 459 of the Code, pursue their claims in the High Court without first exhausting statutory remedies under the Code.

(3) Sections 404 and 455 of the Code confer a discretion on the employee by the use of the word "may".

(4) Sections 404, 455 and 410 conflict with section 459 and it would therefore be unfair to the claimants for the Court to prefer one version of the law to the other.

(5) Mr. Boitnott's claim includes a claim in negligence and is therefore outside the scope of the Code.

Issues

[5] The issues for the determination of this Court are as follows:

(1) Are the defendants entitled to rely on section 455 of the Code or have they, by virtue of CPR rule 9.7, acceded to the Court's jurisdiction (the jurisdiction point)?

(2) Are the claimants entitled, either under sections 404, 455 or 459 of the Code, to directly access the High Court for redress without first exhausting remedies under the Code (the direct access point)?

(3) Are Mr. Kisna and Mr. Boitnott entitled to pursue claims for wrongful dismissal before exhausting remedies under the Code (the wrongful dismissal point)?

The Jurisdiction Point

[6] The defendants contend that the section 455 of the Code transferred original jurisdiction with respect to alleged breaches of the Code to the Labour

Commissioner and the Labour Tribunal and therefore the Court is not competent to exercise its jurisdiction in this matter at this time.

[7] Section 455 of the Code provides that:

> "Complaint to court after internal remedies exhausted
> 455. Except where expressly exempted in this Code, an application for redress of any alleged contravention of this Code may be made to a court only after a complaint has been made to the Labour Commissioner or to the Tribunal or to any other tribunal established for the purposes of dispute resolution under this Code and has been exhausted."

[8] The claimants, in response, say that the defendants have accepted the court's jurisdiction by virtue of CPR 9.7 which provides that:

> "Rule 9.7 –
> (1) A defendant who disputes the court's jurisdiction to try the claim may apply to the court for a declaration to that effect.
> (2) A defendant who wishes to make an application under paragraph (1) must first file an acknowledgement of service.
> (3) An application under paragraph (1) of this Rule must be made within the period for filing a defence; the period for making an application under this Rule includes any period by which the time for filing a defence has been extended where the court has made an order, or the parties have agreed, to extend the time for filing a defence.
> (4) An application under this Rule must be supported by evidence on affidavit.
> (5) A defendant who –
> a) files an acknowledgement of service; and
> b) does not make an application under this rule within the period for filing a defence, is treated as having accepted that the court has jurisdiction to try the claim."

[9] The claim form and statement of claim were served on the defendants, in each of the three cases, on the 20th April 2018. They filed acknowledgments of service in all three cases, within time, on 4th May 2018. The applications disputing the Court's jurisdiction were filed on 4th June 2018. It is not in dispute that those applications were not filed within the time prescribed for the filing of a defence under the CPR. Mr. Raveneau, however, says that he secured Mrs. John-Xavier's agreement for an extension of time to file defences to the claims and produced, on affidavit, what

appears to be a transcript of text exchanges. From those exchanges, it is not clear that the parties agreed on any date for the filing of those defences. This Court cannot conclude, in the absence of a signed agreement, that the parties had agreed to an extension of time for the filing of defences. That, however, is not the end of the matter.

[10] I am not convinced that CPR 9.7 is engaged in these proceedings. I say so because I do not think that section 455 of the Code transfers or removes the original jurisdiction of the Court. It is similar to the requirement in judicial review proceedings that statutory remedies first be exhausted. Such provisions are in the nature of administrative mechanisms designed to avoid burdening the Court with claims that can be dealt with through less contentious and costly avenues. The Court, however, at all times retains its jurisdiction, in appropriate cases where the statutory remedy might not be adequate, to hear and determine a matter notwithstanding the existence of a prescribed statutory remedy.

[11] The Privy Council decision of Texan Management Limited and Others v Pacific Electric Wire & Cable Company Limited[2] provides an exegesis of the provenance and evolution of EC CPR rule 9.7, from which I distill the following:

(1) The English CPR Part 11 is based on English RSC Ord 12, r 8 which did not apply to defendants within the jurisdiction but rather to persons outside the jurisdiction who had been served with a claim and wished to challenge that jurisdiction and set aside service (paragraph 58).

(2) The English CPR Part 11 eroded the distinction between a challenge to the jurisdiction resulting in setting aside of service and an application for a stay of proceedings (paragraph 59).

(3) The English CPR Part 11 has been taken as having been intended to bring applications for a stay of proceedings on the ground of *forum non conveniens* within the scope of CPR Part 11 (paragraph 65).

[2] [2009] UKPC 46

(4) The English CPR 11 (1) should be interpreted as being intended to apply to applications for stays of proceedings as well as challenges to the jurisdiction *stricto sensu* (paragraph 66).

(5) EC CPR 9.7 is the equivalent of the English CPR Part 11 and while EC CPR 9.7 (6) does not contain any reference to a stay of proceedings, it must nevertheless be interpreted as applying also to applications for a stay on *forum non conveniens* grounds (paragraph 67).

(6) Even though EC CPR 9.7(5) contains a provision deeming the defendant to have accepted the jurisdiction of the court, the court has power to extend the period in EC CPR 9.7(3) retrospectively after the period for defence has expired: Sawyer v Atari Interactive Inc[3] (a case of service outside the jurisdiction)

[12] From the above passages, it appears that EC CPR 9.7 is limited in its application to situations where (1) a party challenges the jurisdiction of the court *stricto sensu*, for example, where a party, outside the jurisdiction, disputes the court's jurisdiction to have ordered service of process on him; and (2) a party applies for a stay on *forum non conveniens* grounds. It therefore is not applicable to the instant case where the parties are obviously within the Court's jurisdiction. The defendants did not need to make an EC CPR 9.7 application in order to rely on section 455 of the Code.

The Direct Access Point

[13] The claimants contend that section 404 of the Code leaves it open to a person who alleges a breach of a provision of the Code to choose either to report the matter to the Labour Commissioner or to seek relief from the Court.

[14] Section 404 of the Code provides that:

> "Where any person alleges a violation of a provision of this Code, he or she may report the matter to the Labour Commissioner who may institute or cause to be instituted proceedings before the Tribunal."

[3] [2005] EWHC 2351(Ch), [2006] ILPr 129, at [46].

[15] What section 404 does is to confer on a person who alleges a violation of the Code the right to make a complaint or not. The section cannot be interpreted to mean that the person may either report the matter to the Labour Commissioner or seek relief from the Court. There is nothing in the language or scheme of the Code that supports such an interpretation.

[16] Neither is there anything in the language of section 455 of the Code, set out at paragraph 9 above, that suggests that a person alleging a breach of the Code may, at his option, choose whether to make a complaint to the Labour Commissioner or proceed to the Court.

[17] In relation to section 459 of the Code, the claimants contend that, since they pleaded breach of statutory duty, which is a tort, they are entitled to directly access the High Court. Section 459 provides:

> "459. Notwithstanding any provision made for redress of a contravention under this Code, nothing contained in this Code shall be taken to prohibit or prejudice any suit or proceeding in tort, or any criminal proceeding or any suit under any other law in force in Saint Lucia, existing or in the future, for any act or omission arising out of employment."

[18] What section 459 envisages are freestanding torts like negligence or occupier's liability. The failure to accord natural justice, as required by the Code, to an employee before dismissing him, in my view, cannot be characterized as a tort even though it is, technically, a procedural breach of statutory duty. Indeed, the Code contemplates that where breaches of its provisions are alleged, an employee will complain to the Labour Commissioner. Mr. Boitnott, however, also pleaded negligence for personal injuries. Since this is plainly outside the scope of the Code, he would be entitled to pursue this claim directly in the High Court.

[19] In relation to Mr. Stephen, his cause of action is unfair dismissal, a statutory (as opposed to common law) cause of action. The Courts have consistently applied the principle that remedies for unfair dismissal must first be sought under provisions of

the statute that created it.[4] He is therefore obliged to pursue those remedies available to him under the Code and, if dissatisfied with the decisions of the Labour Commissioner or the Labour Tribunal, he may seek the appropriate remedies in public law as opposed to private law.

Wrongful Dismissal Point

[20] Mr. Kisna pleaded both unfair and wrongful dismissal. His claim for unfair dismissal, like Mr. Stephen's, cannot be sustained. In relation to wrongful dismissal, that common law cause of action is established where an employee is dismissed, under a contract terminable by notice, without being given the contractual notice or the statutory minimum notice: Alicia Sardine Browne and RBTT Bank Caribbean Limited[5] and Michelle Jones and The Saint Vincent and the Grenadines Port Authority.[6] It appears from Mr. Kisna's pleadings that he has not pleaded that he was employed under a contract terminable by notice or that he was otherwise entitled to reasonable notice of the statutory minimum notice. He has therefore not provided a legal basis to ground a claim in wrongful dismissal. Mr. Raveneau's strikeout application, however, is based solely on section 455 of the Code and not on an assertion that Mr. Kisna's pleadings has no prospect of success. In these circumstances, Mr. Kisna's wrongful dismissal claim cannot be struck out.

[21] Mr. Boitnott's claim for unfair dismissal, like those of Messrs Kisna and Stephen, cannot be pursued in the High Court. His claim for constructive dismissal, a statutory cause of action, must also be pursued via the Code. The observations made in relation to Mr. Kisna's wrongful dismissal claim equally apply to Mr. Boitnott's wrongful dismissal claim.

[4] See: Alicia Sardine Browne and RBTT Bank Caribbean Limited, SVGHCV 2006/0520.
[5] SVGHCV 2006/0520 at paragraph 19.
[6] SVGHCV 2009/172 at paragraph 23.

Conclusion

[22] I therefore make the following orders:

(1) The claimant Bertrand Stephen's claim, No. SLUHCV2018/0193, is struck out.

(2) The claimant Tony Kisna's claim for unfair dismissal in Claim No. SLUHCV2018/0192 is struck out.

(3) The claimant Mr. Boitnott's claims for unfair dismissal and constructive dismissal in Claim No SLUHCV2018/0194 are struck out.

(4) Costs are awarded to the defendant in claim no. SLUHCV2018/0193 in the sum of $750.00.

Justice Godfrey P. Smith
High Court Judge

By the Court

Registrar