

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

GRENADA

CLAIM NO. GDAHCV2022/0210 (formerly GDAHCV2018/0327)

IN THE MATTER OF AN ACTION FOR WRONGFUL DISMISSAL

AND

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 77 OF THE
COMPANIES ACT CAP. 58A OF THE 2010 CONTINUOUS REVISED LAWS OF
GRENADA**

BETWEEN:

DAVID LOUIS

Claimant

and

DIWI ENGINEERING LTD.

Defendant

Before:

The Hon. Mde. Justice Agnes Actie

High Court Judge

Appearances:

Ms. Karen Samuel for the Claimant

Ms. Zelica Haynes-Soo Hon with Mr. Kerri-Ann Oliverie instructed by Ms. Dia Forrester for the Defendant

2024: April 29th; 30th;
October 28th.

JUDGMENT

- [1] **ACTIE, J.:** The claimant seeks redress for breach of Section 77 of the Companies Act and damages for wrongful dismissal.

Brief Facts

- [2] The claimant avers that he was employed by the defendant as Resident Engineer, Company Manager and most Senior Executive Officer in or about February 2016 until his dismissal on or about 14th December 2017.
- [3] The claimant avers that prior to his employment with the defendant, he was employed with DIWI Germany GmbH in the post of Resident Engineer from 9th May 2013.
- [4] The claimant avers that DIWI Germany GmbH discontinued operations due to bankruptcy and the defendant was subsequently incorporated with the primary objective of taking over, continuing the work and employing substantially all the facilities and employees of DIWI Germany GmbH.
- [5] The claimant further avers that by express or tacit agreement, the defendant did in fact, as intended, take the claimant and all other staff of DIWI Germany GmbH into its employment upon the same terms and conditions of their appointments with DIWI Germany GmbH.
- [6] The claimant states he was removed from the post and his duties by the defendant without or adequate notice. The claimant considers that the actions of his removal were calculated with malicious intent, and served to frustrate his contract of employment, as employee of the defendant. The claimant further states that the defendant's actions were calculated to destroy the good faith, trust and confidence of their employment relationship which made it impossible for him to continue in the defendant's employment.
- [7] The claimant avers that he demanded to be paid all remuneration and benefits due to him by the defendant, but that to date, the defendant has failed and/or refused to pay to him the sums due. The claimant in a claim form filed on 15th October 2018 claims, a declaration that his removal from the post as director of the defendant was unlawful and in breach of his contract of employment; a declaration that the defendant acted recklessly, deliberately and/or maliciously in refusing to file a notice of change to remove the claimant's name as a director of

the defendant in violation of Section 77 of the Companies Act; an order that the defendant do give to the claimant a full and unqualified indemnity in respect of all acts and omissions of the claimant and to rectify the Companies Register; a declaration that the claimant was wrongfully dismissed by the defendant on or about 14th December 2017; general and exemplary damages; interest and costs.

The Defendant's case

- [8] The defendant denies that the claimant was appointed as resident engineer and company manager during the period as alleged. The defendant states that the claimant was appointed as manager on 14th December 2017.
- [9] The defendant avers that by by-law 4.4.1, the claimant remained a director of the defendant until he effectively notified the defendant by letter dated 28th December 2017 that he deemed himself to no longer be providing his services to the defendant. By letter of 29th December 2017 the defendant informed the claimant that it had not terminated his services to the defendant.
- [10] The defendant asserts that the claimant was never removed as a director nor as an officer of the defendant either in law or otherwise, and avers that the Companies Registrar was notified of the change of directorship of the defendant.

Legal Analysis

Whether the defendant is in breach of Section 77 of the Companies Act

- [11] **Section 77 of the Companies Act Cap 58A** on which the claimant relies states:
- “(1) Within fifteen days after a change is made among its directors, a company shall send to the Registrar a notice in the prescribed form setting out the change; and the Registrar shall file the notice.
- (2) Any interested person, or the Registrar, may apply to the court for an order to require a company to comply with subsection (1); and the court may so order and make any further order it thinks fit”

[12] Counsel for the claimant argues that since the defendant has, up to 2019, refused to file a notice of change of directors, the public is entitled to hold the claimant responsible for acts of the defendant in appropriate circumstances.

[13] **Section 99** of the **Companies Act CAP 58A** gives the defendant the liberty to indemnify a former director or officer of the company in the following manner:

“(1) Except in respect of an action by or on behalf of a company or body corporate to obtain a judgement in its favour, a company may indemnify—

(a) a director or officer of the company;

(b) a former director or officer of the company; or

(c) a person who acts or acted at the company’s request as a director or officer of a body corporate of which the company is or was a shareholder or creditor, and his or her legal representatives, against all costs, charges and expenses (including an amount paid to settle an action or satisfy a judgement) reasonably incurred by him or her in respect of any civil, criminal or administrative action or proceeding to which he or she is made a party by reason of being, or having been, a director or officer of that company or body corporate.

(2) Subsection (1) does not apply unless the director or officer to be so indemnified—

(a) acted honestly and in good faith with a view to the best interests of the company; and

(b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, had reasonable grounds for believing that his or her conduct was lawful.”

[14] The claimant contends that he is entitled to a rectification of the Companies Register of the change of directors removing him, and an indemnity in respect of all acts and omissions of the defendant occurring since 14th December 2017 until the date of filing the notice of change of directors.

[15] The claimant, as a former director, has sufficient standing for this court to so order the compliance of the defendant to **Section 77** of the **Companies Act CAP 58A**. It is the evidence that the claimant is not a director of the defendant. The claimant in a letter dated 28th December 2017 wrote the defendant indicating that he deemed himself to no longer be providing services to the defendant. The defendant in the circumstances ought to have filed the appropriate notice reflecting the change of the directors of the company within fifteen days thereof, as prescribed by statute.

- [16] Although the defendant asserts in pleadings that the prescribed documentation for the change of directors was filed with the Companies Registry, no proof of same has been laid before the court. In fact, the filed company documents on which the defendant relies demonstrates that the claimant is an active director of the defendant.
- [17] Given the defendant's failure to so file the notice of change of directors relieving the claimant from liability, this court finds that the defendant is in violation of Section 77 of the Companies Act.

Whether the claimant had a contract of employment with the defendant

- [18] The determination of the alleged wrongful dismissal of the claimant and the breach of trust and confidence of the employment relationship by the defendant is dependent on the existence of a contract of employment between the parties.
- [19] A contract of employment need not be in any particular form, but can be inferred from conduct which shows that such a contract was intended although never expressed¹. What is required is an examination of all the relevant evidence, including what was said and done between the parties, to determine whether a contract of service may be implied. This can be deduced from the conduct of the parties and the work done².
- [20] The claimant was previously employed by DIWI Engineering GmbH (hereafter referred to as "DIWI Germany") as a resident engineer, by virtue of an employment letter from DIWI Germany dated 10th June 2013.
- [21] The claimant argues that it was an accepted fact that the defendant was a continuance from DIWI Germany, and that from incorporation of the defendant until his termination, he served as company manager and managing director of the defendant. The claimant admits however that up to the date of his termination,

¹ Halsbury's Laws of England (5th edn., 2021) Vol 39 para 14

² Halsbury's Laws of England (5th edn., 2021) Vol 39 para 14

no letters were issued to any employees formalising their transfer of employment, or indicating the terms and conditions.

- [22] The claimant makes reference to letter dated 29th December 2017 from the defendant to the claimant which indicates that the defendant did not terminate the claimant's employment. The claimant further relies on letters dated 15th April 2018 and 18th May 2018 from the then attorneys of the defendant to the claimant's attorneys. In letter dated 18th May 2018, the then attorneys of the defendant state the following:

“...one ought to consider that between the December 14th date and the date of receipt of your client's letter of December 28 which alleges a backdated termination of employment, **your client was de facto an employee of our client company and performing all the relevant actions accordingly.**”
[emphasis mine]

- [23] Moreover, by paragraph 11 of the defence, the defendant admits that the claimant was the “most senior technical officer working for the defendant”, as well as a sole director of the defendant for a period of time.
- [24] The defendant in due conscience cannot now deny that the claimant was not an employee in light of the unequivocal acknowledgments. It is the evidence that the claimant was appointed as company manager of the defendant on 14th December 2017, however the court finds that reference to the claimant as a “senior technical officer” describes a role which the claimant assumed at the defendant company prior to his appointment as manager.
- [25] The court therefore finds an employment relationship existed between the parties when the claimant resigned from the defendant company by letter of 28th December 2017 as company manager.

Whether the claimant was wrongfully dismissed as an employee of the defendant

[26] This court in the case of **Lyndon Roberts v Grenada Co-Operative Bank Limited and others**³, cited the following in determining the correct approach to assessing the issue of wrongful dismissal at paragraph 35 and 36 thereof:

“[35] The issue then is whether the claimant was wrongfully dismissed. Halsbury's Laws of England defines wrongful dismissal as:

‘...a dismissal in breach of the relevant provision in the contract of employment relating to the expiration of the term for which the employee is engaged. To entitle the employee to sue for damages, two conditions must normally be fulfilled, namely:

(1) The employee must have been engaged for a fixed period or for a period terminable by notice and dismissed either before the expiration of that fixed period or without the requisite notice, as the case may be; and

(2) His dismissal must have been wrongful, that is to say without sufficient cause to permit his employer to dismiss him summarily.’

[36] In *Jupiter General Insurance Co. Ltd v Ardeshir Bomanji Shroff*, it was held that the test to be applied with respect to the second condition for wrongful dismissal is whether the misconduct of the claimant was not such as to interfere with and to prejudice the safe and proper conduct of the business of the company, and therefore to justify immediate dismissal. This test varies with the nature of the business and the position held by the employee.”

[27] Further, St. Rose-Albertini J. (Ag) in the **Harvey Setterfield v Anse Chastanet Hotel (Sycum) Limited and another**⁴ judgment dated 9th November 2020, stated at paragraph 62:

“I readily accept that the law on this matter is well settled. It is only where a contract has been wrongfully terminated that an employee becomes entitled to an award of damages. The measure of such damages is the earnings and benefits to which the employee would have been entitled if employment had come to an end in accordance with the contract. An employee is also required to mitigate his losses by taking other employment which is suitable and available”.

³ GDAHCV2018/0421

⁴ [2020] ECSCJ No. 409

- [28] A director who actually works for the company, especially under a service agreement, may also be an employee of the company and entitled to statutory rights⁵. The claimant's complaint does not concern his removal as director of the defendant. Instead, the claimant complains of wrongful dismissal which is primarily a matter of contract and employment law. The fact of a service agreement between the claimant and the defendant is evident from the admission by the defendant as found above.
- [29] The claimant pleads that he was removed from the post of director and from his duties as an officer of the defendant, and that this removal as director and officer of the defendant was such that he was unable to fulfil his functions as employee of the defendant. This, the claimant contends, resulted in his wrongful dismissal as an employee of the defendant.
- [30] In response, the defendant denies the claimant's allegations that he was removed as a director and as an officer of the defendant, either in law or otherwise.
- [31] The claimant is required to prove on a balance of probabilities both limbs of the test for wrongful dismissal as was indicated in **Lyndon Roberts v Grenada Co-Operative Bank Limited and others**⁶ in order to be successful in his claim. Wrongful dismissal, by its definition, arises where an employee is dismissed by an employer.
- [32] However, by the claimant's own pleadings, he asserts that he was constructively dismissed, and "forced out" of his employment by the defendant.
- [33] Constructive dismissal and wrongful dismissal are not synonymous. The **Employment Act Cap 89** states the following with respect to constructive dismissal:

"(1) An employee is entitled to terminate the contract of employment without notice or with less notice than that to which the employer is entitled by any statutory provision or contractual term, where the employer's conduct has made it unreasonable to expect the worker to continue the employment relationship.

⁵ Halsbury's Laws of England (5th edn., 2021) Vol 39 para 8

⁶ GDAHCV2018/0421

(2) Where the contract of employment is terminated by the employee pursuant to subsection (1), the employee shall be deemed to have been unfairly dismissed by the employer.”

[34] The claimant’s contention being one of unfair dismissal as company manager is prevented from seeking recourse in the High Court by the application of the **Employment Act Cap 89**. It is trite, as has been indicated in the Court of Appeal case of **Indra Williams v Casepak Company (Grenada) Ltd**⁷, that:

“Neither the Employment Act nor section 45(4) of the Labour Relations Act of Grenada confer upon the High Court, jurisdiction to hear unfair dismissal claims. Accordingly, the learned judge decision to strike out Ms. Williams’ claim, on the basis that it was unsustainable, is correct”

[35] The court in the circumstances is constrained to deny consideration of the claimant’s complaint which in essence raises the issue of unfair dismissal for which the court lacks jurisdiction.

Whether the defendant breached the implied duty of trust and confidence between the parties

[36] Counsel for the claimant argues that the implied duty of trust and confidence strikes at the heart of the employment relationship, and that the defendant owed the claimant a duty to behave in a manner not to destroy said trust and confidence, if the relationship were to continue.

[37] The implied duty of trust and confidence was set out by the House of Lords in its judgment of **Malik v Bank of Credit and Commerce International SA**⁸. It is an obligation that the employer shall not:

“without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee”

⁷ GDAHCVAP2018/0008

⁸ [1997] 3 All ER 1

[38] The term has, however, been variously described in case law as trust and respect, confidence, co-operation or rendering the contract impossible to perform⁹.

[39] The claimant states that the defendant's actions were calculated to destroy the good faith, trust and confidence in the relationship he held with the defendant and further particularized the defendant's unreasonable behaviour. By letter dated 28th December 2017, the claimant wrote to the defendant indicating that he deemed himself to no longer be providing his services to the defendant. The claimant states in evidence that the chain of events which led to his removal as director included the following:

(1) On 13th December 2017, he received a letter from Ms. Allyson Sparks-Mc Donald for the convening of a shareholders meeting the following morning at the office of Wilkinson, Wilkinson & Wilkinson.

(2) At the said shareholders meeting, Ms. Allyson Sparks-Mc Donald in her capacity as company chairman made the following pronouncements:

- i. Appointment of the following directors: Allyson Sparks-McDonald; Derek Farr; Dr. Linus Spencer;
- ii. Appointment of auditor: La Touche and La Touche;
- iii. Appointment of Attorneys-at-Law: Wilkinson, Wilkinson & Wilkinson;
- iv. Appointment of Bankers: CIBC, Grenada Cooperative Bank, RBTT.

(3) The claimant states that during the meeting he asked if he was a director to which Ms. Sparks-McDonald responded "No".

[40] The court is cognisant of the circumstances in which the employment relationship between the parties came to an end. It is the evidence that the claimant terminated his employment on his own accord.

[41] The authors of **Halsbury's Laws of England**¹⁰ state that:

⁹ Halsbury's Laws of England (5th edn., 2021) Vol 39 para 49 footnote 3

¹⁰ (5th edn., 2021) Vol 39 para 49

“The implied term of trust and respect in the contract of employment has been held to have overriding effect, that is to say that, even where the employer has express power to act in a particular way under the terms of the contract, he must exercise that power in the light of his overall duty of trust and respect, with the result that, if he does not do so, the employee may be contractually entitled to leave his employment and claim constructive dismissal, in spite of the employer's claim that he was merely exercising his contractual rights.”

[42] It is the view of the authors that such a complaint of the breach of trust and confidence arises where the cause of action is that of constructive dismissal. The court is therefore of the view that even if it is found that the actions of the defendant were in breach of the implied term of confidence and trust, the appropriate recourse for the claimant is through the Employment Act by way of a constructive dismissal complaint. Such a complaint under the Act is considered unfair dismissal which is a statutory remedy for which the court lacks jurisdiction.

Conclusion

[43] Given the above circumstances, the claimant is partially successful. The defendant is found to have been in breach of Section 77 of the Companies Act, however the claimant fails on his claim for wrongful dismissal and breach of the implied term of trust and confidence.

[44] It is therefore ordered and declared as follows:

- (1) That the defendant whether by itself, its servants and/or agents, acted deliberately in refusing to file a notice of change of directors to remove the claimant as director of the defendant;
- (2) That the defendant shall immediately rectify the Companies Register by filing a notice of change effective 14th December 2017 with the Registrar of Companies, the said notice to be approved by the claimant's legal practitioners and a filed copy served on the claimant's legal practitioners on the claimant's behalf;

- (3) The defendant shall give to the claimant a full and unqualified indemnity in respect of all acts and omissions of the claimant as director since the 14th day of December, 2017, until the date of the filing of the notice of change of director, such indemnity to be drawn by the claimant's legal practitioners at the cost of the defendant;
- (4) The Registrar of the Supreme Court is authorized to sign the terms of such indemnity should the defendant fails, neglect or refuse to so sign or agree within one (1) month of the date of the making of this Order.
- (5) The claimant's claim for wrongful dismissal and breach of the implied term of trust and confidence is dismissed;
- (6) The parties each having some measure of success shall bear their own costs.

Agnes Actie
High Court Judge

By the Court

Registrar