

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
Civil Division

SAINT LUCIA

Claim No. SLUHCV2021/0308
BETWEEN

DANE FEVRIER

Claimant

-and-

BDSL LINTIED
Trading as
ROYALTON ST. LUCIA HOTEL RESORT AND SPA

Defendant

Appearances:

Lydia B. Faisal for the Claimant; and
Ann – Alicia N. Fagan and Fidel Michel for the Defendant.

2022: February 28;
May 18

DECISION

Defendant's application to strike out claim and for summary judgment

[1] PARIAGSINGH, M: - Before the Court is the Defendant's application¹ seeking an order that:

- a. The causes of action of wrongful arrest, false imprisonment, unlawful search and defamation as contained in the Claim Form and Statement of Claim filed 21 July 2021 be struck out and particularly as follows:
 1. Paragraph (5) sub-paragraphs (3) – (9) of the Claimant's Statement of Case be struck out on the basis that they do not disclose any reasonable ground for bringing the Claim.

¹ Filed on November 22, 2021

2. Paragraph (8) sub-paragraphs (2) – (5) of the Claimant's Statement of Case be struck out on the basis that they do not disclose any reasonable ground for bringing the Claim.
 3. The remedies claimed at paragraph 9 sub-paragraphs (3) – (6) are struck out on the basis that the parts of the statement of case sustaining the claims have been struck out.
- b. A Declaration that the Court does not have jurisdiction to deal with the remainder of the Claim and the matter ought to be remitted to the Labour Tribunal.
 - c. The Defendant/Applicant be awarded costs on the Application and in the Claim to be assessed.

[2] In response to the application the Claimant filed an affidavit in reply². The contents of this affidavit treat with the portion of the application seeking summary judgment. Most of the contents of this affidavit go towards the legal issue raised. It is therefore not necessary to refer to the affidavit in much detail in my respectful view, suffice to say, I have considered it.

APPLICATION TO STRIKE OUT:

[3] The parties have carefully and correctly set out the law on striking out in their respective submissions. There is no need to reproduce it in great detail. It is common ground that the Court will strike out a portion of a party's statement of case if it discloses no grounds for the bringing of the claim.

[4] The striking out of a party's statement of case or any part of it is discretionary. The Court has a series of orders it can make in the exercise of its discretion to avoid deploying the nuclear option of striking out. Thom JA in *Agnes Danzie et al V Cecil Anthony*³ at paragraph 13 stated the approach to be followed in applications such as this:

² Filed on December 30, 2021

³ SLUHC VAP2015/0009

“It is a well-established principle that the court’s power to strike out a statement of case should only be used sparingly (Real Time Systems Limited v Renraw Investments Limited and Others [2014] UKPC 6). Also, in *Salfraz Hussain v Birmingham City Council and Others* the English Court of Appeal, in considering the exercise of discretion to grant relief from sanctions where judgment was entered in default, stated: ‘it must be kept in mind that discretionary powers are not to be exercised in order to punish a party for incompetence—they must be exercised in order to further the overriding objective’. In exercising his discretion, the learned judge was required to consider what was the appropriate response having regard to all of the circumstances, including whether there were other alternatives available that would be just in the circumstances.”

[5] The Defendant in its submission have identified the issue to be determined as; ‘Whether the causes of action of wrongful arrest, false imprisonment, unlawful search and detention are properly constituted against the Claimant’⁴.

[6] The Claimant in his submissions has identified the issues differently. The Claimant identified the issues on the striking out application as⁵:

- a. Can an entity or individual apart from the State be liable for the actions of the Police such as occurred in this case?; and
- b. Whether in the absence of a claim filed independently in defamation, the Court is unable to grant damages for injury to reputation in an employment contract, where a breach of the implied term of mutual trust and confidence is alleged?

[7] From the above, it is clear that the parties see the issue differently. The Claimant contends that the relief claimed are remedies available to him within his claim for breach of contract in relation to the alleged breach of his work contract. The Defendant on the other hand, views the pleaded case as separate causes of action for false imprisonment and defamation.

⁴ Paragraph 4 of Defendant’s submissions filed on January 24, 2022

⁵ Sub-headings B and C of the Claimant’s submissions filed on January 24, 2022

[8] Paragraph 5 sub paragraphs 3 to 9 state that:

In breach of the said implied duty of mutual trust and confidence:

PARTICULARS

1.
2.
3. Next, the Claimant was arrested by the police at the instance of the defendant, and informed that the police would proceed to his house to search for the items that he was accused of stealing from the Defendant. He was then escorted to the rear seat of the police vehicle on the Defendant's compound, in the presence of his work colleagues and guests.
4. The Claimant requested permission to drive his own vehicle which, at the material time, was parked on the Defendant's compound. The police permitted him to do so, but an officer sat in the front passenger seat of the Claimant's vehicle, since he was under arrest.
5. The Claimant's house was searched in the presence of his 13-year old daughter whilst onlookers gathered near his house, seeing the police vehicle and police officers near the home of the Claimant.
6. At no time was a search warrant shown to the Claimant, neither does the claimant believe that a search warrant was ever obtained for the conduct of a search of his home.
7. The police officers, acting on the Defendant's orders and instructions, and in full view of onlookers, took away the 40 bottles of the wines/spirits/liquor/rum that the Claimant, as a collector of fine wines, had accumulated over more than ten-years. The said collection had great sentimental value to the Claimant and cannot be adequately compensated in money. The police officer then drove the Claimant to the police station in Gros Islet, taking the confiscated items with them.
8. At the police station, the Defendant's Cost Controller and its Chief Security Manager untruthfully claimed that they had identified 14 of the Claimant's bottles of wines/spirits/liquor/rum as the property of the Defendant. However, all of the 40 bottles were confiscated.

9. The Claimant was taken to the Gros Islet Police Station, where he was locked in a cell from Thursday 14th June 2018, at approximately 2:45p.m. until about 11 :00a.m. on Friday June 15th 2018.

[9] The Defendant contends that the lawful authority for an arrest is found in section 3(2) (e) of the Constitution⁶. It is further submitted that Section 570(3) of the Criminal Code⁷ gives a police officer the power of arrest without a warrant anyone whom he or she with reasonable cause, suspects committed the offence.

[10] The Defendant further submitted that the Constitution does not bind private individuals and only concerns any action between the State and the individual. Reference is made to the decision of *Shamal Charles v The Attorney General* ⁸, *Danny Edwidge v The Attorney General*⁹ and *Rudolph Dosserie v Renwick & Company*¹⁰.

[11] I agree with the law stated by the Defendant. The only authority I consider to be of any assistance from the Defendant on the issue that I have to decide is the case of *Rudolph Dosserie*. All the other cases relied on do not treat with the issue of informant liability for false imprisonment, which is the Claimant's pleaded case.

[12] Least there be any doubt the claim is not for damages for false imprisonment by the Police. The Claimant's case is for false imprisonment arising out of the reports he contends was made to the police by the Defendant's employees on which the police had a duty to act and did so.

⁶ Chap 1.01

⁷ Chap 3.01

⁸ SLUHCV2009/1045

⁹ SLUHCV2018/0271

¹⁰ SLUHCV2016/0217

[13] The Defendant's submission seems to appreciate the nature of the Claimant's case when it accepts at paragraph 13 of its submission that Rudolph Dosserie "is instructive as it concerns an almost fact pattern"¹¹.

[14] The Defendant then seems to shift gears even further and now says, informant liability is not made out on the claim as "On a close examination of the claim, it is evident that it is devoid of any pleadings as to the material facts which gave rise to the cause of action of vicarious or informant liability"¹².

[15] In response the Claimant relies on the cases of *Barkhuysen v Hamilton* ¹³ to ground his submission that there is no requirement

".....for some act or some words amounting to a demand, a request or an urging of the police to take action, it being enough that the informant had made a charge on which it had become the duty of the police to act; that, addressing the issue as one of substance rather than form, the defendant was liable because she had placed the police in a position where it had been their duty to act as they did so that the arrest and detention had, in practice, been inevitable consequences of her report to the police, which had lacked any reasonable objective basis.."

[16] Having considered both submissions, I agree with the Claimant. The Claimant's case is that "[He] was arrested by the police at the instance of the defendant."¹⁴ in its plainest form, that is a claim for informant liability. It has nothing to do with the State, police, the powers of arrest or the Constitution as alluded by the Defendant. The Defendant's reference to the power of arrest and the Constitution takes the claim way outside of the pleaded case.

[17] For these reasons, I find no merit in the objection to paragraph 5 sub paragraphs (3) to (9) of the statement of claim.

¹¹ Paragraph 13

¹² Paragraph 15

¹³ [2016] EWHC2858

¹⁴ Paragraph 3 line 1 of the Statement of Claim.

CONSTITUTIONAL BAR TO PROCEEDINGS AGAINST THE CROWN :

[18] The Defendant in its submissions also addressed Article 2124 of the Civil Code¹⁵ which deals with the prescription period for bringing an action against public officers. The Defendant also submits that the claim cannot be remedied at this juncture by joining the Crown or officers involved in the arrest.

[19] For completeness, I am of the view that Article 2124 of the Civil Code has no applicability to this application. Further, there is no suggestion or application by anyone to join the Crown or the officers involved. Again, the Defendant's submission takes the case outside what is pleaded. Consideration of joining anyone in my respectful view, simply does not arise.

[20] Paragraph (8) sub-paragraphs (2) – (5) state:

- '8. By virtue of the Defendant's repudiatory breach, the Claimant's job was wrongfully terminated on the 14th day of November 2018. On account thereof, the Claimant has suffered injury, loss and damage, in that, the Claimant:

PARTICULARS

1.
2. Lost the value of the 40 bottles of alcoholic beverages and other items that were confiscated from his home which he reasonably estimates at the cost of \$5,000.00 US and which to the best of the Claimant's recollection is listed in the schedule hereto;
3. Suffered humiliation and embarrassment on account of being wrongfully arrested and detained at the Gros Islet Police Station for nearly 24 hours based on the Defendant's false report;
4. Suffered humiliation on account of the unlawful search of his home by the police in the presence of his 13-year old daughter, and during which search curious onlookers converged in the vicinity of his home;
5. Suffered the loss of his reputation on being accused of stealing, and for having been arrested and detained, by virtue of which he was unable to obtain a job in Saint Lucia

¹⁵ Chap 4.01

and had to find a similar job overseas. Even in his current job overseas, reference was made by his employer to the incident, which he had to explain to his current employer;'

[21] The Defendant contends that the; "defamation claim is not properly constituted as the pleadings do not state specifically what the defamatory words were and specifically by whom they were spoken, whether they were spoken of and concerning the Claimant, whether and how these words were published"¹⁶

[22] Reference is also made to CPR Rule 69.2 and the case of *Levi Maximea v The Dominica Agricultural industrial and Development Bank et al*¹⁷. The Defendant's submission is that there is no real or substantive tort pleaded by the Claimant as it relates to defamation and the claim for damages for injury to reputation is an abuse of process.

[23] In reply, the Claimant relies on the case of *Marco Lau v Royal Bank of Canada*¹⁸. The Claimant contends that there is no stand-alone case for damages for defamation. The Claimant contends that he can recover damages for loss or injury to reputation in his claim for breach of contract. He submits that the trial Court having considered the manner of the termination, it can go on to consider any damage to his reputation caused by the termination. He submits that three additional conditions must be satisfied:

1. The employee's reputation is damaged by public knowledge of false allegations relating to the termination
2. The employer fails to take reasonable corrective steps and offers no reasonable excuse for such failure, and
3. The damage to the employee's reputation has impaired his ability to find new employment.

[24] In my view, no consideration of the above three conditions can be done in the absence of evidence.

¹⁶ Paragraph 17 of Defendant's submissions.

¹⁷ DOMHCV2016/0160 per Stephenson J

¹⁸ 2017 BCCA 253

[25] The Claimant further relies on the House of Lord decision of **Malik v Bank of Credit and Commerce International SA (in liquidation)**¹⁹ where it is stated that:

'In my judgment, therefore, the authorities relied on by Morritt LJ do not on analysis support his conclusion. Moreover, the fact that in appropriate cases damages may in principle be awarded for loss of reputation caused by breach of contract is illustrated by a number of cases which Morritt LJ discussed: *Aerial Advertising Co v Batchelors Peas Ltd (Manchester)* [1938] 2 All ER 788; *Foaminol Laboratories Ltd v British Artid Plastics Ltd* [1941] 2 All ER 393; *Anglo-Continental Holidays Ltd v Typaldos Lines (London) Ltd* [1967] 2 Lloyd's Rep 61. But, unlike Morritt LJ, I regard these cases not as exceptions but as the application of ordinary principles of contract law'

[26] Having considered both submissions, I agree with the Claimant.

[27] The Claimant's case is not a stand-alone claim for damages for defamation. The Claimant's claim is for damage to reputation within his claim for breach of contract of his employment.

[28] Whilst the Defendant has correctly set out the law in respect of pleadings in a defamation claim, this is not such a claim.

[29] For these reasons, I also find no merit in the objection to paragraph 8 sub paragraphs (2) to (5) of the statement of claim.

[30] The other portion of the statement of claim sought to be struck out relate to the remedies claimed. Those paragraphs will not be struck out having regard to my reason above.

[31] In the circumstances, the Defendant's application to strike out is dismissed.

¹⁹ [1997] IRLR 462 at 471

DEFENDANT'S APPLICATION FOR SUMMARY JUDGMENT:

[32] Pereira CJ in *Dr. Martin Dider et al v Royal Caribbean Cruises Ltd et al*, SLUHCVP2014/0024 at paragraph 23 outlined the approach the court ought to take in an application for summary judgment:

'While a claimant's pleaded case may be properly constituted, it may very well be completely hopeless in the face of a defendant's defence, and therefore, the claimant will have no real prospect of succeeding. Similarly, a defendant who puts forward a defence which clearly cannot stand up to a claimant's pleaded case will have no real prospect of successfully defending the claim. In either of these instances, it would be appropriate for the court to enter summary judgment on the claim pursuant to Part 15 of CPR provided that the issues in the claim are ones which are suitable to be dealt with using the summary procedure. In disposing of a claim summarily, the court would essentially consider the legal issues in the case, determine, on a balance of probabilities and in light of the affidavit evidence adduced by the parties, whether one party or the other has no real prospect of succeeding on the claim and enter judgment accordingly. This will be a judgment on the merits.'

[33] The onus is on the Defendant to satisfy the Court that the Claimant has no real prospect of succeeding in this claim.

[34] The basis of the Defendant's application for summary judgment is Section 455 of the Labour Act²⁰ which states that:

Complaint to court after internal remedies exhausted

455. Except where expressly exempted in this Act, an application for redress of any alleged contravention of this Act 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.

²⁰ Chap 16:04

[35] The Defendant relies on the case of *Dwayne Chidi Tobias v Saint Lucia Air and Sea Ports Authority* ²¹ to support its submission that the Court did not have jurisdiction as the Claimant ought to have exhausted internal remedies under the Act.

[36] In *Dwayne Chidi Tobias*, the Claimant was called into a meeting at which he was given the option to resign or be immediately dismissed. He was shown two cheques made for different sums representing what the Defendant said he would be entitled to if he was dismissed or if he resigned. Of relevance is that the Claimant had received three warning letters before his termination regarding matters falling under Section 133 of the Labour Act. The Claimant was; “shown a letter of termination that indicated that three warning letters concerning his performance had been issued to him and that his performance had been reviewed, consequent upon which his employment was being terminated.”²² The Claimant signed a letter of resignation. His claim was framed as a claim for breach of contract of employment. The allegations of the breach related in large measure to breach of the rules of natural justice.

[37] *Cenac- Phulgence J* found as a fact that although the claim was framed as a claim for breach of contract and wrongful dismissal, in manner of the termination fell within the instances provides for in Section 133 of the Act for the employer to have been entitled to summarily dismissed the Claimant. At paragraphs 26 and 28 the Court stated unequivocally that a claim for unfair dismissal and wrongful dismissal are distinct claims that can co-exist, one governed by common law and the other by statute. The Court stated:

‘[26] The principle arising from the cases is as the parties have stated above. In *Burrill v Schrader*, the question was whether the employees’ exhaustion of the procedure for conciliation prescribed by the Labour Code was a prerequisite to recourse to the court for vindication and enforcement of their rights? The court there stated that the Code did not abolish the

²¹ SLUUCH2017/0028

²² Paragraph 3 per *Cenac – Phulgence J*

common law right not to be wrongfully dismissed. The Code merely supplemented that right with the right not to be unfairly dismissed, with the result that the employee had a common law and statutory right, which co-exist. The common law right of action against wrongful dismissal could only be restricted or abolished by clear and unambiguous language in the statute or by necessary implication. An indication that statutory procedure is mandatory in where it is prescribed for the benefit of both parties.

[27]

[28] The case of *Alicia Sardine Browne v RBTT* also considered whether a claim for unfair dismissal precluded a claim for wrongful dismissal. Following *Burrill v Schrader*, the Court decided that a claim for unfair dismissal did not preclude one for wrongful dismissal. In that case, another question under consideration was whether a claim of unfair dismissal could be initiated in the High Court. The Court found that it could not, based on the mandatory wording of the provisions setting out the procedure for making a complaint under the Protection of Employment Act, which required an employer or employee who alleged any failure to comply with that Act to make a complaint in the first instance to the Labour Commissioner. The Court noted the use of the word 'shall' in the provisions and the fact that the provision extended the requirement to do so to both parties, which is an indication that the provisions were intended to be mandatory.'

[38] In my view the facts of this case are distinguishable from the facts of *Dwayne Chidi Tobias*. There is no pleading or allegation that the Claimant was 'guilty' of serious misconduct. In my view such a finding is a precondition to summary dismissal on the ground of serious misconduct on the basis of theft. Section 133 (1) and (2) of the Act states:

133.— (1) An employer is entitled to dismiss, summarily without notice, an employee who is guilty of serious misconduct of such a nature that it would be unreasonable to require the employer to continue the employment relationship.

(2) Serious misconduct includes but is not limited to —

- (a) willful disobedience of lawful orders given by the employer;
- (b) repeated substantial neglect of duties;
- (c) repeated absence from work without the permission of the employer or without reasonable excuse;
- (d) refusing to follow health and safety measures instituted at work thereby endangering the health and safety of employees or members of the public;

- (e) theft or willful damage of property of the employer or another employee at the work place; or
- (f) conduct inconsistent with the fulfillment of the expressed or implied terms of the employee's contract of employment.

[39] In my view to summarily dismiss an employee the employer must make a finding. This implies some type of investigative procedure or hearing, the overall guiding principle being the rules of natural justice prevailing.

[40] If such a finding of guilt was made, as was done in *Dwayne Chidi Tobias* then the dismissal is provided for under Section 133 of the Act and consequently Section 455 of the Act applied.

[41] Section 455 of the Act is not framed in mandatory language so as to create an ouster of jurisdiction. It uses the word "may". In my view the Court ought to decline to exercise jurisdiction once the dismissal falls within the ambit of the Act until the matter is referred to the Labour Commissioner of the Tribunal.

[42] The Defendant in its defence has denied that there was repudiatory breach of the contract. It is averred that the Defendant was suspended and a disciplinary hearing was held. Several things not consequential to this application happened after which "By letter dated 14 November, the Claimant's suspension was revoked, and he was invited by the Defendant to resume his duties, following the conclusion of the investigation of the matter."²³ This alone in my view makes this case distinguishable from *Dwayne Chidi Tobias*.

[43] It is accepted that the measure of damages for the common law claim of wrongful dismissal is different from the measure of damages in a claim for unfair dismissal. One is contingent on the notice period, and one is not. In this claim, there is no pleading by the Defendant that the dismissal was not wrongful but rather unfair. Neither is it pleaded that the Claimant was summarily dismissed. The Defendant

²³ Paragraph 3 of the Defence

admits the Claimant was terminated but avers that; “The Claimant did not resume his duties and his contract of employment was terminated consequent on that fact”²⁴

[44] For these reasons, I am of the view that the Claimant’s claim for wrongful dismissal is not subject to Section 455 of the Labour Act, it being a common law action not circumscribed by the Act. The Defendant’s application for summary judgment is accordingly also dismissed.

COSTS:

[45] There is no reason to depart from the general rule that costs follow the event. The Defendant having been unsuccessful in this matter shall pay the Claimant’s costs to be assessed if not agreed.

ORDER:

[46] It is hereby ordered that:

1. The Defendant’s application filed on November 22, 2021, is dismissed;
2. The Defendant shall pay the Claimant’s costs of the application to be assessed by this Court in default of agreement within 28 days on the application of either party.

Alvin Shiva Pariagsingh
High Court Master

By the Court,

Registrar

²⁴ Paragraph 3 of the Defendant’s defence.