

EASTERN CARIBBEAN SUPREME COURT

**SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

SKBHCV2019/0152

BETWEEN:

Jermaine Isaac

Devon Mills

Claimants/Respondents

and

St. Kitts-Nevis Cable Communications Limited

Defendant/Applicant

Before:

Mrs. Michelle John-Theobalds

Master [Ag.]

Appearances:

Ms. Sharina Laws for the Claimants/Respondents

Ms. Marlene Uter Bent for the Defendant/Applicant

2021: February 16

2022: June 30

JUDGMENT

[1] **THEOBALDS M [AG.]**: This is an application by the defendant/applicant, St. Kitts-Nevis Cable Communications Limited (“the Employer”) for summary judgment on a claim filed by the claimants/respondents, Jermaine Isaac and Devon Mills (“the Employees”).

Background

- [2] Both employees worked for the employer as technicians until their termination on 22nd January 2018. Jermaine Isaac was employed as a general technician from 1st November 2001 and received a weekly salary of EC \$844.31, whilst Devon Mills was employed as a field technician from 12th June 2000 and received a weekly salary of EC \$576.35. It is accepted between the parties that there was no written contract of employment between the Employees and the Employer.
- [3] In October 2017, the Employer informed its employees that a revised Employee Manual (“the Revised Manual”) would be introduced and was set to be implemented in January 2018. The Employer met with employees concerning the Revised Manual and employees were given the opportunity to seek legal advice in relation to the same.
- [4] All employees were asked to sign and return a document entitled “Receipt and Acknowledgement of the Cable Employee Manual” (“the Acknowledgment”) by 15th January 2018. By signing the same, employees were acknowledging that they had received, read, and understood the policies contained in the Revised Manual. The Employees however refused to sign the Acknowledgment. They indicated that they wanted to obtain legal advice as to the legal implications of the new terms sought to be included in the Employee Manual. Consequently, on 15th January 2018, both Employees met with representatives of the Employer and were again asked to execute the amended manual and they declined.
- [5] The Employer’s Human Resource Manager immediately suspended the Employees indefinitely claiming that they were not to resume work unless and until the contract or agreement sheet was signed by them and further indicated that the Claimants would not be paid until that order was carried out.
- [6] By letter dated 17th January 2018, the Employer informed Devon Mills that his failure to sign the Acknowledgment was cause for immediate termination. The letter also informed that Mr. Mills’ failure to report to work for the two days immediately prior to

the date of the letter could be considered abandonment of the post. He was directed to return the signed Acknowledgment by the close of business on that very day and was also suspended from his employment for 3 days.

- [7] Following the receipt of this letter to Mr. Mills, on 18th January 2018, both Employees caused their attorneys to write to the Employer concerning their threatened termination. The Employees received no response to this letter.
- [8] As the Employees refused to sign and return the Acknowledgment, they were both terminated with immediate effect by correspondence dated 22nd January 2018. The Employees were each paid 10 weeks of wages in lieu of Notice as well as their vacation leave entitlement up to the time of termination.
- [9] By claim form and statement of claim filed on 31st May 2019, the Employees sought damages for breach of contract of employment and unfair dismissal against the Employer. The Employer filed a defence on 18th July 2019 and on 27th May 2020, filed the present application for summary judgment on the claim contending that the Employees had no real prospect of succeeding on the claim.

The Law on Summary Judgment

- [10] Under rule 15.2(1) of the **Civil Procedure Rules 2000** (“CPR”) the court has a discretion as to whether or not an application for summary judgment ought to be granted. Rule 15.2(1) states:
 - “The court may give summary judgment on the claim or on a particular issue if it considers that the –
claimant has no real prospect of succeeding on the claim or the issue;”
- [11] In the case of **Swain v Hillman**,¹ Lord Woolf MR stated that the phrase ‘no real prospect of succeeding’ did not need any explanation as it spoke for itself.

¹ [1999] EWCA Civ 3053.

- [12] Lord Woolf MR's statement in **Swain** was quoted with approval in the case of **Saint Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste**.² At paragraph 21 of the judgment the Court of Appeal stated that:

"Summary judgment should only be granted in cases where it is clear that a claim on its face obviously cannot be sustained, or in some other way is an abuse of the process of the court. What must be shown in the words of Lord Woolf in **Swain v Hillman** is that the claim or the defence has no "real" (i.e. realistic as opposed to a fanciful) prospect of success. It is not required that a substantial prospect of success be shown. Nor does it mean that the claim or defence is bound to fail at trial. From this it is to be seen that the court is not tasked with adopting a sterile approach but rather to consider the matter in the context of the pleadings and such evidence as there is before it and on that basis to determine whether, the claim or the defence has a real prospect of success. If at the end of the exercise the court arrives at the view that it would be difficult to see how the claimant or the defendant could establish its case then it is open to the court to enter summary judgment."

- [13] Lord Woolf further cautioned in **Swain** that summary judgment applications are not to be mini trials. He urged that such applications have to be kept within their proper role. These are not meant to dispense with the need for a trial where there are issues which should be considered at trial. These are simply to be summary hearings to dispose of issues where there is no real prospect of success.³

- [14] Having regard to these well-established principles, the main issue to be determined is whether the Employees have a real prospect of succeeding on the claim. In the claim form, the Employees have sought damages under two causes of action, namely, breach of contract of employment and unfair dismissal.

- [15] In its application for summary judgment, the Employer proposed issues for the court to deal with at the hearing of the application. This is in compliance with rule 15.4 of the **CPR** which states:

"(1) Notice of an application for summary judgment must be served not less than 14 days before the date fixed for hearing the application.

² [2010] ECSCJ No. 8.

³ Supra n. 1 at paragraph 20.

(2) The notice under paragraph (1) must identify the issues which it is proposed that the court should deal with at the hearing.”

[16] The issues proposed by the Employer are:

- i. Does the court have jurisdiction to hear and determine the respondents/claimants claim of unfair dismissal from their employment with the applicant/defendant?
- ii. Did the applicant/defendant breach the contract of employment with the respondents/claimants by terminating their employment on 22nd January 2018?
- iii. If the applicant/defendant breached the contract of employment with the respondents/claimants, what is the applicable measure of damages?

[17] The first issue as posited by the Employer deals with the claim for unfair dismissal and the second and third issues both deal with the claim for breach of contract of employment. I will deal with each claim in turn.

The claim for damages for unfair dismissal

The Employer's submissions

[18] The Employer contends that the Employees have no real prospect of succeeding in their claim for damages for unfair dismissal since, as they pointed out in their written submissions filed on 24th August 2020, the court does not have the jurisdiction to hear and determine such claims. The Employer relies on the cases of **Byron Smith v British Virgin Islands Electricity Corporation**⁴ and **Indra Williams v Casepak Company (Grenada) Ltd. (Trading as Calabash Hotel)**.⁵ They argue that unfair dismissal does not exist at common law. They further noted that section 82 of the **Virgin Islands Labour Code, 2010**⁶ was similar to section 11 of the **Protection of Employment Act**⁷ of St. Christopher and Nevis (“the **St. Kitts Act**”) but that section

⁴ [2009] ECSCJ No. 1.

⁵ [2018] ECSCJ No. 178.

⁶ Act. No. 4 of 2018, Laws of the Virgin Islands.

⁷ Cap. 18.27, Revised laws of Saint Christopher and Nevis 2017.

11 did not state the term unfair dismissal. The Employer further argued that they did not dismiss the Employees for any of the reasons stated in section 11.

The Employees' submissions

- [19] In their submissions filed on 25th August 2020, the Employees quoted section 5 of the **St. Kitts Act** stating that they did not fall into any of the categories under that section to warrant their termination without notice. They continued to quote section 11 and argued that the Revised Manual violated their employment rights and as such, they declined to execute the same without first obtaining legal advice. They argue that the court does have jurisdiction to hear the claim since the Employer's actions were in violation of the **St. Kitts Act**.

Discussion

- [20] It is trite law that unfair dismissal is not an action recognised at common law. As the case of **Byron** rightly held:
- “Unfair dismissal does not exist as a concept at common law but was created and introduced into the field of employment law by statute.”
- [21] Unfair dismissal is a statutory remedy which has already been introduced into the legislation of various Eastern Caribbean islands.⁸ The question then becomes whether the remedy of unfair dismissal was incorporated into the laws of Saint Christopher and Nevis.
- [22] In **St. Kitts Marriott Resort v Deborah Stevens**⁹ the Court of Appeal noted that the statute law governing the termination of employment in St. Kitts was the **St. Kitts Act**. In drawing a comparison with other comparative legislation in the Eastern Caribbean, the Court explicitly found that the **St. Kitts Act**, did not create the statutory remedy of unfair dismissal which these other legislations did,¹⁰ however it

⁸ See Cap. 27, Antigua and Barbuda Labour Code, Laws of Antigua and Barbuda; Cap. 15.03, Montserrat Labour Code, Revised Laws of Montserrat, 2013; Act. No. 20 of 2003, Protection of Employment Act 2003, Laws of Saint Vincent and the Grenadines.

⁹ SKBMCVAP2016/0001 (delivered 30th October 2020, unreported).

¹⁰ Supra n. 9 at para. 31.

created a remedy for an employer or employee who complains that the provisions of the act have been contravened in respect to their employment. Consequently, Webster JA opined:

“The remedy is contained in Section 56 of the **[St. Kitts] Act** which provides that:

“(1) Any employer or employee ... may make a complaint to the Commissioner that the provisions of this Act have been contravened by an employer or employee and in any complaint made to the Commissioner in accordance with this subsection, the employee and employer shall have the right to be represented.

(2) Upon receipt of a complaint under the preceding subsection, the Commissioner shall forthwith take appropriate steps in accordance with the provisions of the Labour Act, Cap. 18.18 to assist the parties to arrive at a settlement.” (emphasis added)

If the Commissioner fails to achieve voluntary adjustment or settlement within 14 days of the receipt of the complaint, he must refer the dispute to the Minister of Labour who will, if necessary, conduct a hearing into the matter. Subsection 8 then provides that:

“Any employer or employee who is dissatisfied with any recommendations or findings given or made under this section may appeal to a judge in chambers who may in addition to any other remedy, order reinstatement of any employee or make any award of compensation.”

[23] Webster JA noted at paragraph 33 of **St. Kitts Marriott Resort** that the result of these provisions was that an aggrieved employee had a specific statutory remedy for challenging contraventions of the **St. Kitts Act** by using the procedures set out in the statute. This specific statutory remedy created by the statute evidently ousts the jurisdiction of the court in relation to unfair dismissal.

[24] For these reasons, I agree with the Employer’s submissions that this court does not have the jurisdiction to hear and determine unfair dismissal claims in St. Kitts. Whilst the Employees argued that the Employer contravened provisions under the **St. Kitts Act**, there is no evidence before me that the specific statutory remedy as set out in section 56 was ever pursued by the Employees. In light of this, it is not open to the court to assume jurisdiction in the absence of any statutory provision which permits

this.

[25] I am of the view that the Employees' claim for damages for unfair dismissal has no realistic prospect of success. I would therefore enter summary judgment in favour of the Employer on this aspect of the Employees' claim.

[26] I now turn to their claim for damages for breach of contract of employment.

The claim for damages for breach of contract of employment

The Employer's submissions

[27] The Employer argues that the Employees have no realistic prospect of succeeding on this aspect of their claim. In written submissions, the Employer denies having committed any breach of the Employees' contracts of employment. They rely on the affidavit evidence of Ms. Judith Hewlett filed on 27th May 2020 in support of the summary judgment application. They set out in detail in both Ms. Hewlett's affidavit and their Defence filed on 18th July 2019 the circumstances leading up to the termination of the Employees. Essentially, the Revised Manual had been introduced and the Employees refused to sign their agreement to same. The Employees were given a deadline within which to do so but failed to comply. For this, they were immediately terminated on 22nd January 2018.

[28] The Employer further contends that even if they had committed a breach, the measure of damages would be consistent with the notice pay already paid to the Employees and so they would not be entitled to any further payments. They stated that the Employees were each paid their vacation leave entitlement and 10 weeks' salary in lieu of notice. There was therefore no material on which the court could consider an award to the Employees outside that due to them under the **St. Kitts Act**.

The Employees' submissions

- [29] The Employees argue that the issue of reasonable notice and payment in lieu of notice should be determined by the court. They noted that in the circumstances, such matters should be fully ventilated before the court can make a summary decision. In the claim form and statement of claim, they particularized the details of the Employer's breach contending that their termination was unreasonable, without valid cause and violated the terms of agreement of their employment then existing. The details leading up to their termination on 22nd January 2018 do not differ substantially to that of the Employer's. However, they argue that it was never a condition of their contract that their employment was open ended or that either party could unilaterally terminate without notice and without reason.

Discussion

- [30] It must be highlighted that unlike a claim for unfair dismissal, the common law does recognize claims for damages for the breach of an employment contract. In **St. Kitts Marriott Resort v Deborah Stevens**¹¹, the employee brought a common law claim for damages for breach of her employment contract. She argued that she was wrongfully dismissed and entitled to damages based on reasonable notice, which in turn, depended on all the circumstances of her employment.
- [31] It must be reiterated that the court is only tasked with determining whether the Employees have a realistic and not merely fanciful prospect of success. In making such a determination, the court will not embark on a mini trial of the issues. The court's role, having regard to the overriding objective of the **CPR**, is to review the evidence before it to decide whether the claim, on its face, obviously cannot be sustained or is in some way an abuse of process of the court. As held in **Swain**, a summary judgment hearing is not meant to dispense with the need for a trial where there are issues which should be investigated at trial.

¹¹ Supra, footnote 9.

[32] Having regard to the evidence before the court, I find that there are live issues which should be investigated at a trial. The Employees argue that there was a breach, and their termination violated the terms of their employment then existing, whereas the Employer denies this. What cannot be denied is that the Employees were immediately terminated without notice. The Employer argues that it was justified in so doing since the Employees refused to sign the Revised Manual, whereas the Employees state that the termination was unreasonable and was without valid cause.

[33] Whether or not there has been a breach of the Employees' contracts of employment as it pertains to the manner of their termination, is an issue for determination by the trial judge, having regard to all of the evidence. This is particularly so since the Employees' contracts were never reduced to writing. Should this issue be determined in the Employees' favour, then the issue of the applicable measure of damages would arise.

[34] Accordingly, I am of the view that live issues remain for the proper determination by the trial judge and so, despite the Employer's contention that their claim has no real prospect of success, I disagree. It cannot be said that the Employees' claim for damages for breach of their employment contracts is an abuse of the court's process, neither is it a claim which is not maintainable. Therefore, the application for summary judgment fails in this respect.

Conclusion

[35] Based on the reasoning above, I make the following orders:

- i. The application for summary judgment is granted only in relation to the claim for damages for unfair dismissal.
- ii. The claim for damages for breach of contract of employment is to be set down for case management before the master.
- iii. Costs to be in the cause.

[36] Finally, I am grateful to counsel for their helpful submissions, and I apologise for the delay in delivering this judgment.

Michelle John-Theobalds
Master [Ag.]

By the Court

Registrar