

[2] The defendant contends that the claimant's claim is for constructive dismissal within the meaning and intents of the **Sections 76 and 80(1) of the Employment Act** and is accordingly deemed to be treated as a claim for unfair dismissal for which the court lacks jurisdiction.

[3] The claimant in an affidavit in opposition states that her claim is for breach of contract of employment which is a common law cause of action for which the court has jurisdiction to determine and asks that the defendant's application be dismissed.

Background

[4] The claimant was a former employee of the defendant. The claimant in a claim form and statement of claim filed on 17th June 2020, seeks declaratory reliefs, inter-alia: that the defendant acted in breach of: (i) the contractually agreed disciplinary procedure and implied duty of trust and confidence during her period of employment.

: (ii) the statutory notice period in the Employment Act and accordingly seeks damages for breach of contract of employment, aggravated damages and other consequential reliefs.

[5] The defendant in its application and submissions contends that it can be discerned based on the claimant's pleadings in the statement of claim and in particular paragraphs 14 to 21, that the claimant's cause of action is for unfair dismissal for which the court does not have jurisdiction. Counsel relies on the Court of Appeal decision in **Indra Williams v Casepark Company (Grenada) Ltd**¹.

[6] In his filed submissions, Kevon Charles, counsel for the claimant states that the core of the claimant's claim lies in a cause of action of breach of the employment contract existing between the claimant and the defendant immediately before the wrongful and/or constructive dismissal of the claimant. Counsel relies on the House of Lords decision in **Eastwood and another v Magnox Electric PLC Mc Cabe v Cornwall County Council and another** ².

¹ GDAHCVAP2018/0008

² [2005] 1AC 503

Analysis

- [7] It is settled law that that an employee's remedy for unfair dismissal whether actual or constructive is a statutory remedy for which the court lacks jurisdiction.³ Blenman JA in the Court of Appeal in **Indra Williams v Casepak Company (Grenada) Ltd** said:

"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".

- [8] At paragraph 28 of the judgment, Blenman JA said

"Unfair dismissal is entirely a creature of statute, as distinct from the common law cause of action of wrongful dismissal. It is of note that the common law cause of action wrongful dismissal co-exists with the statutory creation of unfair dismissal".

- [9] The Court of Appeal made it clear in its ruling that where a statement of claim consists of a cause of action in both unfair dismissal and wrongful dismissal, the claim for unfair dismissal will fail for lack of jurisdiction and the common law claim for wrongful dismissal shall remain.

- [10] Counsel for the claimant in submissions in opposition to the application to strike out states that the core of the claimant's claim is for the common law breach of contract of employment as it touches the breach of the employment contract immediately preceding her wrongful and/or constructive dismissal. Counsel contends that the employer's breach of the terms and conditions of the employment contract existed separate and apart from the dismissal itself and relies on the House of Lords decision in **Eastwood and another v Magnox Electric PLC Mc Cabe v Cornwall County Council and another** where it was held that:

" where an employee had, prior to his unfair dismissal, whether actual or constructive , acquired a common law cause of action against his employer in respect of the employer's failure to act fairly towards him, and financial loss had flowed directly from that failure, he could, subject to the rule against double

³ Indra Williams v Casepak Company (Grenada) Ltd³.

recovery, bring an action at law in respect of that loss and such action was not barred by the availability of a claim in the employment tribunal under the unfair dismissal legislation: and that in the claimants' cases constituted causes of action that had accrued before their dismissals and those causes of action should be permitted to proceed to trial. "

[11] At paragraph 27, Lord Nicholls of Birkenhead said:

"The statutory code provides remedies for infringement of the statutory right not to be dismissed unfairly. An employee's remedy for unfair dismissal, whether actual or constructive, an employee has acquired a cause of action at law, for breach of contract or otherwise, that cause of action remains unimpaired by his subsequent unfair dismissal and the statutory rights flowing therefrom. By definition, in law such a cause of action exists independently of the dismissal".

[12] The House of Lords decision draws a distinction between the actual unfair dismissal and accrued common law rights and causes of actions arising before the unfair dismissal. The Loss flowing from the impugned conduct taking place before actual or constructive dismissal lies outside the statutory unfair dismissal and the loss flowing from the dismissal itself is within the unfair dismissal.

[13] The claimant's case raises the issue of breach of implied trust and confidence based on the actions of the employer before dismissal. A continuous course of conduct leading to dismissal in a case of constructive dismissal requires a distinction to be drawn between loss flowing from antecedent breaches of the trust and confidence term in the contract and loss flowing from the employee's acceptance of these breaches as a repudiation of the contract.

[14] It follows that where the cause of action accrues prior to the dismissal then the common law jurisdiction to proceed to trial remains and the claim is removed from the strict statutory regime of unfair dismissal for which the court would not ordinarily have jurisdiction. In such cases the employee has a common law cause of action which precedes and is independent of his/her subsequent dismissal.

[15] As indicated above, the claimant's extant pleaded case is based on breaches of the contract of employment. The claimant outlines the employer's conduct leading to her suspension and eventual constructive dismissal. The claimant seeks declarations that the defendant acted in complete breach of (i) the disciplinary procedures contractually agreed between the parties;(ii) the implied trust and confidence and seeks damages for breach of contract and damages resulting from the breach of the implied trust and confidence required between employer and employee among other reliefs.

[16] The defendant's application to strike out the claim has in effect dissected the claimant's pleadings and relies solely on the paragraphs dealing with the actual dismissal and seeks to treat the claim as a claim for unfair dismissal within the meaning and intent of the **Employment Act**. This in my view is only one aspect of the claimant's claim. The claimant's claim raises issues relating to the conduct of the employer leading up to the ultimate perceived constructive dismissal which is an issue outside the actual dismissal.

[17] The House of Lords decision has established that the fact that the employee is ultimately unfairly dismissed will not preclude a claim for damages on the basis for example that an employer's poor treatment in suspending the employee amounted to a pre-dismissal breach of contract. The House of Lords in such a case recognizes an employee as having a cause of action for breach of contract on events leading up to the dismissal. In cases for example where the employer has breached the implied term of trust and confidence before the dismissal, a common law claim can be brought as the implied term does not apply to the actual act of dismissal.

[18] In deciding whether to strike out the claim, I am guided by the Court of Appeal decision in **Citgo Global Custody NV v Y2K Finance Inc**⁴ Where Edwards JA said :

"On hearing an application made pursuant to CPR 26.3 (1)(b) the trial judge should assume that the facts alleged in the statement of case are true. Despite this general approach, however, care should be taken to distinguish between primary facts and conclusions or inferences from those facts. Such conclusions or inferences may require to be subjected to closer scrutiny".

⁴ (BVI High Court Civil Appeal No. 22 Of 2008),

“Among the governing principles stated in Blackstone’s Civil Practice 2009 the following circumstances are identified as providing reasons for not striking out a statement of case: where the argument involves a substantial point of law which does not admit of a plain and obvious answer; or the law is in a state of development; or where the strength of the case may not be clear because it has not been fully investigated. It is also well settled that the jurisdiction to strike out is to be used sparingly since the exercise of the jurisdiction deprives a party of its right to a fair trial, and its ability to strengthen its case through the process of disclosure and other court procedures such as requests for information; and the examination and cross-examination of witnesses often change the complexion of a case”.

[19] Applying the House of Lord decision to the case at bar, I am of the view that the application to strike out should be dismissed. The defendant has not in my view satisfied the court that it should exercise the draconian measure of striking out at this preliminary stage.

ORDER

[20] For the foregoing reasons, it is ordered and directed as follows:

- (i) The defendant’s application to strike out the claim is dismissed.
- (ii) Costs to the claimant in the sum of \$500.00 to be paid prior to the first case management conference.
- (iii) The defendant shall file a defence within fourteen (14) days of today’s date.
- (iv) The claimant may file a reply in accordance with CPR 10.9.
- (v) The matter shall thereafter be listed before the master for case management conference in keeping with CPR 2000.

Agnes Actie

High Court Judge

By the Court

Registrar

