IN THE SUPREME OF JUDICATUE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO 2007 HCV 01124

BETWEEN	**MARILYN HAMILTON**	**CLAIMANT**
AND	**UNITED GENERAL INSURANCE CO. LTD**	**DEFENDANT**

Mr. Paul Beswick instructed by Beswick, Ballentyne & Company for the Claimant
Ms. S. Atkinson instructed by Hart, Muirhead Fatta for the Defendant

Application to Strike out Claimants Claim – Alternatively to Strike out Paragraphs of Particulars of Claims – Part 26.3(1) (b) and (C) CPR 2002

Application for Summary Judgment Part 15 CPR 2002

Heard: 28th May, 9th June, 18th & 29th July, 2008

Thompson-James, J

This is an application to strike out the Claimant's statement of case pursuant to Rule 26.3 of the Supreme Court of Jamaica Civil Procedure Rules 2002 or alternatively to strike out paragraphs of the Claimant's Particulars of Claim or alternatively to order Summary Judgment on the claim pursuant to part 15.6 of the Supreme Court of Jamaica Civil Procedure Rules 2002).

Background

On the 12th March 2007 the Claimant Marilyn Hamilton filed a claim against the Defendant, United General Insurance Company Limited (herein after referred to as UGI) for wrongful dismissal from her job as Information Systems

Manager at the Defendant's Insurance Company and for damages, special damages for wrongful dismissal and loss of job benefits and pay, and further damages for anxiety and depression and for slander and defamation of character. Along with this claim form was filed a Particulars of Claim. This Particulars of Claim was quite extensive. The Defendant UGI on the 2nd May 2007 filed a defence followed by the instant application on the 7th May 2007.

The Applicant/Defendant seeks the following orders:-

1. That the Court strikes out the claim pursuant to Rule 26.3 of the civil Procedure Rules (2002) hereinafter referred to as the CPR 2002.
2. Alternatively that the Court strikes out the following paragraphs of the Claimant's Particulars of Claim:-
    (a) Paragraph 9
    (b) Paragraph 10
    (c) Paragraphs 11 through 13, paragraph 15 through to 18
    (d) Paragraph 19 and
    (e) Paragraph 20
3. Alternatively that the Court orders Summary Judgment in the claim pursuant to Rule 15.6 of the CPR 2002 amongst others.

This application is supported by an affidavit sworn to by learned Counsel Miss Charlene Atkinson, Attorney-at-Law, representing the Defendant/Applicant.

Defendant/Applicant's Submission

In support of her application Miss Atkinson made reference to the following exhibits:

AGI "1" – The contract of employment between Claimant/Respondent hereinafter referred to as the Respondent and Defendant/Applicant hereinafter referred to as the Applicant.

AGI "2" – Salary calculation subsequent to the Applicant's separation from her job.

AGI "3" – A letter from the Applicant to the National Commercial Bank, 31 Duke Street, Kingston with specific reference for remuneration to the Applicant as an amount in relation to her termination.

Miss Atkinson submitted that the Respondent was terminated for introducing pirated software into the Company. Consequently she was terminated as per her contract hence her claim before the Court is an abuse of the Court's process pursuant to part 26.3 (1) (b) of the CPR 2002 or that parts of the particulars of Claim be struck out pursuant to 26.3(1)(c) as such part sdisclose no reasonable grounds for bringing or defending a claim or in the alternative that Summary Judgment be ordered to the Respondent under part 15.6 of the CPR 2002.

She indicated that there is no real prospect of the claim succeeding since all that is required for the contract between the Applicant and the Respondent to be terminated is one (1) month's notice pursuant to exhibit – AGI "1", that is the contract of employment between the parties and this has been complied with as indicated by exhibit AGI '2", and the post termination calculations and the payments involved in AGI '3' the letter to the bank. She further submitted that the Defendant has a real prospect of successfully defending the claim as the

Applicant's contract of employment was legally terminated on the 28th July 2006 and all that she is entitled to is one (1) month's notice.

She sought to introduce the provisions of a pension trust relating to paragraphs 9 to 13 of the Particulars of Claim however learned counsel for the Respondent objected to the introduction of the operation of this trust as there was nothing put before the Court relating thereto on which the Court could obtain information or place reliance. This objection was upheld. The submission concluded on the note that the Court should grant the orders requested as this would be in keeping with the overriding objectives of the CPR 2002 that is to deal with cases justly.

She responded to a comment made by Counsel for the respondent in the ....that **Addis vs. Gramophone Co. Ltd.** (1909) AC 488 1 is settled law.

Claimant/Respondent's Submission

Citing **Boardman vs. Copel and Borough Council** C.A. 13th June 2001.

Schiemann L.J. on page 1 of the judgment pointed out:

> "Now it has been generally thought that the Common Law measure of damage for wrongful dismissal is the amount of wages or salary lost during the period between the date of dismissal and the earliest date in which the employee could lawfully have been dismissed.
>
> **Addis vs. Gromophone** (Supra) has generally been taken as deciding what is contained in the head note namely, that, where an employee is dismissed from his employment, the damages for his dismissal can not include compensation for the manner of his

dismissal, for his injured feeling, or for the loss he may sustain from the fact that the dismissal itself makes it more difficult for him to obtain fresh employment .....and Lord Stein was in a minority of one in **Johnson vs. Unisys Ltd** (Supra)."

Learned Counsel for the Respondent Mr. Paul Beswick Attorney-at-Law on the other hand in a quite intense and extensive manner opposed the application on a number of bases.

In essence and this is by no means indicative of all that was proposed for consideration, Mr. Beswick submitted that the claim is in fact in order and that the Particulars of Claim in all respect discloses cause of action.

He dealt with paragraphs 1 – 6 pointing out these paragraphs disclose cause of action.

Referring to paragraph 7, he points out that the Claimant will by disclosure determine the maximum values of the various benefits and paragraph 8 he proposed that at the time of termination the Defendant had failed to pay the non taxable portion of the motor vehicle allowance due to the Claimant.

Paragraphs 9, 10, 11, 12, 13 he submitted deals with the Respondent's pension and, where there is a contract that deals with pension scheme it must go to trial as it is a matter for the Court to determine, placing reliance on **Bold v. Borough Nicholson & Hall Ltd** 1936-1963 Vol. 3 AER.

Paragraph 15 through to 18 he proposed dealt with the Claimants age and the consequent disadvantages of obtaining alternative employment at her age – (paragraph 20 seems to be connected to paragraph 15 – 18).

In relation to paragraph 19 he refers to the effect of an importation of obloquy among the commercial community of the Island consequent on the defamation of the Respondent.

He further proposed that the Applicant had not denied the defamation but only refer to it as giving no rise to a cause of action.

Mr. Beswick also submitted that what existed between the Claimant and the Defendant is a contract of employment and it is for a judge to say if the Respondent has a claim, to determine legal obligations between the parties in the claim filed and based on the evidence to come to a determination. It is for a judge to look at the issues of law involved and to determine whether or not there was a breach of contract he further submitted.

He referred to the personal clause characteristics of the employed as a factor in assessing compensation relying on the authority of **Fougere vs. Phoenix Motor Co. Ltd** AER 1977 Vol. 1 for general guidance in this respect as well as **Johnson vs. Unisys Ltd 2003 AC 51**

Addis vs. Gramophone (Supra) was referred to in relation to libel and slander accompanying the proceedings for wrongful dismissal.

The obligation of trust and confidence implied in contracts of employment is also submitted for consideration.

Quite an interesting point was taken in relation to Counsel for the Applicant arguing the affidavit in support of the Application sworn to by her, referring to the case of **Murray vs. Jacobs 1967 10 WIR 490** – an unfortunate

practice according to Lewis C.J., that should be stopped. The Court did not find it necessary to comment on this point.

Other authorities relied on by Mr. Bewsick were:

Jupiter General Insurance Company Ltd vs. Ardeshor Bomanji Shoff, 1937 Vol. 3 AER **Laws vs Linden Chronicles (Indicator Newspaper)** Ltd 1936 – 1959 Vol. 2 AER page 785.

Lisamae Gorden vs. Fair Trading Commission Supreme Court of Jamaica 2005 HCV 2699 judgment delivered on 28th March 2008.

Referring to the Jupiter case (Supra) Mr. Beswick pointed out that the Claimant was dismissed for one (1) act of negligence and is distinguishable from the instant case.

He further submitted that it is utterly inappropriate to deprive the Respondent of the right to proceed with her case at this point in time as well as the fact that he did not see a distinction between wrongful dismissal and the dismissal principles, as England had codified the dismissal principles and call it wrongful dismissal.

The applicant's reference to the Respondent's introduction of pirated software into the company does not disclose what type of pirated software was introduced.

He concluded that the Respondent's case should be heard on its merits.

The Applicable Law

Stuart Sime: Practical Approach to Civil Procedure 6th Edition at page 272 points out that it is recognized in several places in the CPR and supplementary

practise directions that striking out under Rule 3.4 is closely related to the Jurisdiction to enter summary judgment. Both powers are used to achieve the active case management aim of disposing of issues that do not need full investigation at the trial.

By part 26.3(1) of the CPR 2002

In addition to any other powers under these Rules, the Court may strike out a statement of case or part of a statement of case if it appears to the Court –

(b) That the statement of case or the part to be struck out is an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings;

(c) That the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending ing the action.

At page 277 of Stuart Simes (Supra) it is stated that according to **McDonald Corporation vs. Steel 1995 3 AER 615**, it is an abuse of process where the statement of case is incurable incapable of proof. The fact that a party's case may be incapable of proof may become apparent after disclosure of documents or after exchange of witness statements. In **McDonald Corporation vs. Steel** (Supra) – it is said that striking out on this basis will be fairly unusual, as there are few cases which are sufficiently clearly and obviously hopeless that they deserve the Draconian step of being struck out. In dealing with obstructing the just disposal of the proceedings in **Phillips vs. Phillips 1878 4QBD 127** Cotton L.J. said:

"In my opinion it is absolutely essential that the pleading not to be embarrassing to the Defendants, should state those facts which will put the Defendants on their guard and tell them what to .....when the case comes on for trial".

By Part 15.2 of the CPR 2002

The Court may give summary judgment on the claim or a particular issue if it considers that:

(a) The Claimant has no real prospect of succeeding on the claim or the issue; or

(b) The Defendant has no real prospect of successfully defending the claim or issue.

In **Swain vs. Hillman 2001 AER 91** Lord Woolf M.R. at page 92 of the judgment referring to the English CPR 24.21 which provision is similar to Part 15 of the CPR 2002 points out that –

"The Court now has a very salutatory power both to be exercised in the Claimants favour or where appropriate in a Defendants favour. It enables the court to dispose summarily of both claims or defences which has no real prospect of being successful. The words "no real prospect of succeeding" do not need any amplification, they speak for themselves. The word real distinguishes fanciful or suspects."

"It is important that the judge in appropriate cases should make use of the powers under part 24. In doing so he or she gives effect to the overriding objectives contained in Part 1. It saves

expenses, it achieves expectations. It avoids the Courts resources being used up in a case where this serves no purpose."

Application of the Law to the Submission

I have considered the provisions of part 15 of the CPR 2002 and the discretionary powers given to the Court as outlined by Lord Woolf M .R in **Swain vs Hillman** (Supra), and note the Court may order summary judgment against a Claimant on the claim or a particular issue if

(a) it considers that:

(1) The Claimant has no real prospect of succeeding in the claim or issue

(2) That the Defendant has no real prospect of successfully defending the claim or issue and (b) there is no other reason why the case or issue should be disposed of at the trial

I have also considered the provisions of parts 26.3(1) of the CPR 2002 dealing with the striking out of cases or parts thereof where there is an abuse of the process of the Court or obstructing the just disposal of the case as well as disclosing no reasonable grounds for bringing or disposing of the case.

In listening to and considering the submissions on both sides, I find that there are issues relating to:

(i) The contract of employment between the parties.

(ii) The separation of the Respondent from her job.

(iii) Her remunerations to include her pension after the separation

(iv) The probable effect of the termination on her.

(v) Her present position on the job market

(vi) The defamation and slander issues.

These are all matters, I find that should be dealt with at the trial. These are all matters, I find to be aired and considered carefully by a judge at the trial.

The letter of termination bears the date 28th July 2006. This claim was filed on the 12th March 2007. This matter I find is still well within its limitation period. If there are amendments to be made to either particulars of claim or the defence there is still enough time for this to be done and I cannot see any prejudice resulting to either party.

Conclusion

In **Swain vs. Hillman** (Supra) at page 95 Lord Woolf M R concluded that useful though the power is under part 24 –

> "It is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues that should be investigated at the trial.
>
> The proper disposal of an issue under part 24 does not involve the judge conducting a mini-trial, that is not the objective of the provision. It is to enable cases where there is no real prospect of success either way, to be disposed of summarily."

Judge L.J. at page 96 of the judgment points out that:-

> "The discretion to give summary judgment does not arise merely because the court concludes that success is improbable."

On the basis of the foregoing I find that there are issues to be investigated and aired at a trial.

It is hereby ordered:

(1) Application in terms of paragraphs 1,2 & 3 of Notice of Application for Court orders dated and file on the 7th May 2007 refused.

(2) Case Management Conference fixed for 14th July 2009 @ 10:00p.m. for 1 hour

(3) Costs to the Claimant/Respondent to be agreed or taxed.

(4) Special Costs Certificate for one (1) Counsel granted.