IN THE SUPREME COURT OF BERMUDA
Commercial Court
Civil Jurisdiction

2006: No. 31

BETWEEN:

ALLISON THOMAS

Plaintiff

and

FORT KNOX BERMUDA LTD

First Defendant

and

TROY SYMONDS

Second Defendant

and

SHARI POE

Third Defendant

RULING
(In Chambers)

Date of Hearing: 26 November 2009

Date of Ruling: 3 December 2009

Mr. Mark Diel, Marshall Diel & Myers, for the Plaintiff

Mr. Ben Adamson, Conyers Dill & Pearman, for the 1st Defendant

Ms. Fozeia Rana-Fahy, Mello Jones & Martin, for the 2nd & 3rd Defendants

Introduction

1. This ruling is concerned with the effect of the Employment Act 2000 ("the Act"), and the Act falls to be considered in this case in the context of an application to strike out paragraph 8 of the statement of claim filed in these proceedings, on the basis that it fails to disclose any reasonable cause of action and/or is abusive and vexatious.

2. The Plaintiff ("Mr. Thomas") was employed by the first defendant ("the Company") as its "Chief Operations Officer". The terms of his dismissal and the consequent claim for compensation are set out relatively briefly in the statement of claim, and I will set out the pertinent paragraphs, as follows:

> "5. By way of a letter dated 1st November, 2005 the Plaintiff's employment with the First Defendant was terminated with immediate effect and the First Defendant paying the Plaintiff one month's salary in lieu of notice.
>
> 6. It was an implied term of the Plaintiff's contract of employment that the Plaintiff's employment could only be terminated upon the giving of reasonable notice.
>
> 7. The First Defendant is in breach of the implied term as a reasonable notice period would be in excess of nine months.
>
> 8. Further and in the alternative the termination of the Plaintiff's employment is in breach of the Employment Act 2000."

3. There is one other matter to which I would refer at this stage, and that is the terms of an email exchange between counsel which took place in early November. Mr. Adamson sent an email to Mr. Diel, in which he noted that paragraph 8 of the statement of claim did not refer to any specific section of the Act, and asked that Mr. Diel confirm that the allegation in the pleading

was to the effect that Mr. Thomas had been terminated in breach of the sections contained in part IV of the Act. Mr. Diel responded that that was a fair assumption, noting that the Act provided for certain and limited reasons or ability to terminate an employee, and that the Company had not complied with the statutory regime and so was in breach.

The Written Submissions of Counsel

4. Both sides had prepared written submissions pursuant to a consent order for directions dated 15 October 2009 which provided for sequential submissions.

5. The submissions for the Company started by drawing a distinction between wrongful dismissal claims and unfair dismissal claims. In respect of the former, the Company submitted that such claims could be brought both before the Employment Tribunal ("the Tribunal") established by the Act, and by civil proceedings through the courts; in respect of the latter, the Company submitted that such claims were exclusively the domain of the Tribunal. Mr. Adamson supported his position by referring to two English authorities, *GAB Robins (UK) Ltd –v- Triggs* [2008] ICR 529 and *Johnson –v- Unisys* [2001] ICR 480.

6. The written submissions for Mr. Thomas contended that the Company's submissions were misconceived. Mr. Thomas relied upon section 18 (1) of the Act, which provides that an employee's contract of employment shall not be terminated by an employer unless there is a valid reason for termination connected with:

    a. the ability, performance or conduct of the employee; or
    b. the operational requirements of the employer's business.

Mr. Thomas contended that no valid reason had been given and that the Company's sole defence has been to rely upon a contractual term which is contrary to section 18, and which expressly excludes cause.

7. The written submissions for Mr. Thomas then continued that the Company's submissions are contrary to the judgment of Kawaley J in the case of *Robinson –v- Elbow Beach Hotel* [2005] Bda LR 8. Mr. Diel contended that this case was exactly on point, and contained compelling and reasoned consideration of issues which either had not been raised or were not capable of being raised in the authorities relied upon by Mr. Adamson. Particularly, Mr. Diel submitted that those authorities either did not have enshrined constitutional rights, or this argument has not been considered by the court in question.

8. It is not clear from Mr. Diel's written submissions that he appreciated the grounds upon which Mr. Adamson relied to strike out paragraph 8, namely that proceedings under the Act based on unfair dismissal can only be taken before the Tribunal. His submissions started by saying that the application concerned wrongful dismissal, whereas Mr. Adamson's submissions had started with reference to unfair dismissal. Mr. Adamson's submissions sought to put the legal basis for wrongful dismissal and unfair dismissal in context, and his application was predicated on the basis that a claim under part IV of the Act is necessarily a claim for compensation based on unfair dismissal. In this regard, perhaps the reference in Mr. Adamson's submissions to wrongful dismissal claims being capable of being brought both in employment tribunals and the civil courts was confusing, although no doubt an argument can be made that a dismissal pursuant to section 25 is a wrongful dismissal if serious misconduct is not established. But in practical terms, wrongful dismissal claims properly so called (as to which see below) are pursued through the courts, not least because once it has been established that there was no serious misconduct, proceedings under the Act are effectively proceedings for unfair dismissal. Neither the statement of claim nor Mr. Diel's submissions used the words "unfair dismissal", but the email exchange referred to makes it clear that a claim based on part IV of the Act was maintained, whether or not such a claim was necessarily a claim based on unfair dismissal.

9. Before leaving the subject of counsel's written submissions, I would just refer to one aspect of those put forward by Mr. Thomas. There is a related piece of litigation (proceedings # 162 of 2008) where Mr. Thomas petitioned for relief under section 111 of the Companies Act 1981, which provides for an alternative remedy to winding up in cases of oppressive or prejudicial conduct. The petition also sought rectification of the Company's share register, although there is no such plea in the points of claim which have now been filed in those proceedings, and indeed Mr. Diel had indicated at an earlier interlocutory hearing that rectification of the register was not being pursued. However, the written submissions for Mr. Thomas referred to fraud on the minority and to rectification as if those claims were being made in these proceedings, and the submissions continued by saying that if the Company were correct, certain aspects of Mr. Thomas's complaints would be dealt with by the Court and other aspects by the Tribunal, both dealing with similar evidence, which Mr. Thomas then said is not "socially useful", using a phrase from Kawaley J's judgment in *Robinson*. But the unfair prejudice and rectification claims are the subject of separate proceedings, and thus necessarily fall to be determined by the Court, as opposed to the Tribunal, and being made in entirely separate proceedings will therefore require separate evidence to be filed in any event.

Counsel's Oral Submissions

10. For the Company, Mr. Adamson took the position that the reference in paragraph 8 of the statement of claim was clearly a reference to the unfair dismissal provisions of the Act, something which he said was confirmed in the written submissions for Mr. Thomas. But he said that if paragraph 8 did nothing more than rely upon the notice period, then it was superfluous, and if it was indeed a reference to the unfair dismissal provisions of the Act, they had to be dealt with by the Tribunal as opposed to the Court. Mr. Adamson emphasised that the case of *Robinson* was concerned with wrongful dismissal, and accordingly had no application to the issue before me. He further referred to the provisions of section 36 (1) of the Act, which give a period of only three months within which to make a complaint. Mr. Adamson's submission was

that if complainants could by-pass the regime established by the Act, the time bar would be illusory and the legislative purpose of swift resolution of employment disputes would be lost.

11. During the course of his oral submissions, I pressed Mr. Diel in regard to the circumstances in which a wrongful dismissal claim could be pursued through the courts without reference to the provisions of the Act. The example which I gave covered the situation where an employee was dismissed without a valid reason for termination, and also in breach of the notice requirements of his contract, whether by ignoring an express notice period, or in the absence of an express notice period, by using a period which was unreasonable. The question I then asked was whether that employee could pursue a claim through the courts for wrongful dismissal (the failure to give the express or reasonable notice) and elect not to pursue a claim under the Act for unfair dismissal, based on the lack of a valid reason for termination. Mr. Diel's response was in the negative, on the basis that the provisions of the Act were imported into the contract between employer and employee, such that a claim for wrongful dismissal could not be pursued without regard to the Act. The consequence, Mr. Diel submitted, was that there could not be an implied term as to reasonable notice when the Act provided that there had to be a valid reason for dismissal.

12. And in relation to *Robinson*, Mr. Diel's submissions were that it made no difference which section of the Act one was referring to, or whether one was considering wrongful dismissal, either on a common law or statutory basis, or unfair dismissal on a statutory basis. Mr. Diel submitted that the effect of Kawaley J's decision in *Robinson* was that access to the courts was not ousted by the Act, and a claimant was free to pursue his statutory discrimination claims before the courts. The words "statutory discrimination claims" are Mr. Diel's. Those words clearly refer to a claim made under the Act for unfair dismissal.

13. So although Mr. Diel did not draw a distinction between proceedings at common law for wrongful dismissal and proceedings under the Act for unfair dismissal, he clearly took the position that his client's claim was made under the Act, without accepting the distinction which Mr. Adamson had made, and maintained that a claim made under the Act could be made before the courts without reference to the procedure set out in the Act.

The Common Law Position

14. Before turning to the effect of the passing of the Act, it is no doubt helpful to remind oneself of the position as it was immediately prior to the passing of the Act, at common law. I will do this by reference to the two cases cited by Mr. Adamson, both of which set out the common law position in the United Kingdom. In *GAB Robins (UK) Ltd –v- Triggs*, Rimer LJ summarised what Lord Hoffmann had said in *Johnson –v- Unisys*, in these terms:

> "Lord Hoffmann explained, at para 35, that the first question was whether the implied term of trust of confidence owed by an employer to an employee also applied to a dismissal. The problem lay in the fact that the common law entitles an employer to dismiss an employee without giving him a hearing and for unreasonable and capricious motives, and that the employee in such a case has no remedy at common law unless the dismissal is in breach of contract. The consequence is that a common law action for wrongful dismissal can at most yield compensation measured by reference to the salary that should have been paid during the contractual period of notice:"

15. And Lord Hoffman himself in *Johnson –v- Unisys* referred to a judgment of the Supreme Court of Canada, in the following terms:

> "39 The effect of such a provision at common law was stated with great clarity by McLachlin J of the Supreme Court of Canada in

Wallace –v- United Grain Growers Ltd (1997) 152 DLR (4th) I, 39:

> "The action for wrongful dismissal is based on an implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship (or pay in lieu thereof) in the absence of just cause for dismissal…A 'wrongful dismissal' action is not concerned with the wrongness or rightness of the dismissal itself. Far from making dismissal wrong, the law entitles both employer and employee to terminate the employment relationship without cause. A wrong arises only if the employer breaches the contract by failing to give the dismissed employee reasonable notice of termination. The remedy for this breach of contract is an award of damages based on the period of notice which should have been given." "

The Legislative Change in the United Kingdom

16. In *Johnson –v- Unisys* Lord Millett set out some of the history to the passing of the Industrial Relations Act 1971, the forerunner of the Employment Rights Act 1996. He referred to the disparity between the consequences of termination of employment by an employer, and that by an employee, which had led to a Royal Commission, which concluded that it was urgently necessary for employees to be given better protection against unfair dismissal and recommended the establishment of statutory machinery to achieve this.

17. That recommendation led to the passing of the Industrial Relations Act 1971, and in terms of the relationship between the new rights and the old, Lord Millett had this to say:

> "This left the common law and the contract of employment itself unaffected. It did not import implied terms into the contract. Instead it created a new statutory right not to be unfairly dismissed,

enforceable in the newly established National Industrial Relations Court."

Lord Millett explained why it was therefore necessary that some claims brought under the new act, including a claim in respect of unfair dismissal, had to be brought by way of complaint to an employment tribunal, and not otherwise.

18. This accorded with the view expressed by Lord Hoffmann. He referred in paragraph 54 of his judgment to the fact that the remedy adopted by Parliament had not been to build upon the common law by creating a statutory implied term that the power of dismissal should be exercised fairly or in good faith. Instead, he noted, the new statutory system set up an entirely new system outside the ordinary courts, with tribunals staffed by a majority of lay members. Lord Hoffmann then referred to the action taken by Mr. Johnson, who wished to claim "a good deal more" than the statutory maximum. He said the question was whether the courts should develop the common law to give a parallel remedy which was not subject to any such limit, and he answered that question in the following terms:

> "57 My Lords, I do not think that it is a proper exercise of the judicial function of the House to take such a step. Judge Ansell, to whose unreserved judgment I would pay respectful tribute, went in my opinion to the heart of the matter when he said:
>
> > "there is not one hint in the authorities that the…tens of thousands of people that appear before the tribunals can have, as it were, a possible second bite in common law and I ask myself, if this is the situation, why on earth do we have this special statutory framework? What is the point of it if it can be circumvented in this way?... it would mean that effectively the statutory limit on compensation for unfair dismissal would disappear."

58 I can see no answer to these questions. For the judiciary to construct a general common law remedy for unfair circumstances attending dismissal would be to go contrary to the evident intention of Parliament that there should be such a remedy but that it should be limited in application and extent."

19. And in *GAB Robins (UK) Ltd –v- Triggs* Rimer LJ confirmed the exclusive jurisdiction of employment tribunals, and the continued existence of the common law right to sue for wrongful dismissal in the following terms:

> "Employment tribunals have an exclusive jurisdiction to hear and adjudicate upon claims for unfair dismissal. No such claim can be brought before the ordinary civil courts, although claims for *wrongful* dismissal (dismissal in breach of the terms of the employment contract) can of course be so brought."

20. So there is no question but that Mr. Diel's submissions would fail in the context of the United Kingdom regime. The passages I have quoted make it quite clear that in the United Kingdom:

a. the new legislation left the common law and the contract of employment itself unaffected;

b. in particular, the new legislation did not import implied terms into the contract of employment;

c. instead it created a new statutory right not to be unfairly dismissed, enforceable by application to an employment tribunal;

d. employment tribunals thus have an exclusive jurisdiction to hear and adjudicate upon claims for unfair dismissal;

e. no such claims can be brought before the ordinary civil courts;

f. however, claims for wrongful dismissal (dismissal in breach of the terms of an employment contract) can be so brought.

The Effect of the Passing of the Act in Bermuda

21. So against that background in relation to the common law, which is the same in Bermuda as in the United Kingdom, and the effect of the passing of the United Kingdom legislation, it is necessary to consider whether the passing of the Act in Bermuda had the same or a different effect than in the United Kingdom.

22. I start by seeking to summarise the relevant provisions of the Act in relation to termination of employment. I have set out the terms of section 18 (1) in paragraph 6 above, and would add that section 18 (1A) provides that an employee's contract of employment shall not be terminated by an employer under subsection (1) unless the notice requirements under section 20 and the provisions under section 26 or 27 have been complied with. Section 20 sets out the statutory notice periods. Sections 24 to 27 deal with misconduct, in terms respectively of disciplinary action, summary dismissal for serious misconduct, termination for repeated misconduct, and termination for unsatisfactory performance. None of these sections has any application to the instant proceedings, and neither is section 20, which deals with notice periods, of any relevance. This section provides for minimum periods of notice, but the longest of these is one month, and as appears from the extract from the statement of claim which I set out in paragraph 2 above, Mr. Thomas has been paid one month's salary in lieu of notice.

23. So one then comes to the unfair dismissal provisions of the Act, which are set out in section 28. That section sets out a variety of matters which do not constitute valid reasons for dismissal, including but not limited to matters affecting human rights, and provides that the dismissal of an employee is unfair if based on any of the grounds listed in the section. Sections 29 to 33 deal respectively with constructive dismissal, redundancy, sham sales of a business, lay offs, and winding up of a business, none of which has any relevance for the purpose of this case. Sections 34 to 41 deal with enforcement, covering the establishment of the Tribunal, the designation of persons to be inspectors, providing for the right to make a complaint to an

inspector within three months, covering the inquiry by an inspector, then dealing with the hearing of complaints by the Tribunal, and then providing for remedies and appeals.

24. There is no reference whatsoever in these parts of the Act, which deal both with termination of employment and enforcement provisions, to a claim for wrongful dismissal, that is to say a dismissal in breach of the terms of the governing employment contract. The closest the Act comes is in section 25 which authorises dismissal for serious misconduct, but as appears from the extract cited in paragraph 15 above, dismissal for serious misconduct is to be distinguished from wrongful dismissal, which is not concerned with the wrongness or rightness of the dismissal, but with the period of notice. The Act, like its United Kingdom counterpart, is concerned only with unfair dismissal, and those words appear any number of times in the relevant sections. The concept of unfair dismissal is, to my mind, quite clearly different from that of wrongful dismissal, and I see nothing in the Act which treats the two as one and the same.

The *Robinson* Case

25. This is no doubt a convenient point to consider the case of *Robinson*, on which Mr. Diel placed much reliance. First, there was at least a contention in that case that the subject matter of the action was being investigated by an inspector under the Act. At the same time, a complaint had been made to the Human Rights Commission ("the Commission") and the Commission had itself commenced an investigation. The plaintiff had been suspended from his employment following the initial complaints, and it seems he was dismissed when the Commission made a preliminary finding against him. The proceedings which he issued alleged that he had been wrongfully dismissed pursuant to section 25 of the Act. As I have indicated, that section gives an employer an entitlement to dismiss without notice or payment of any severance allowance an employee who is guilty of serious misconduct.

26. So *Robinson* is not a case of unfair dismissal; it is a case where the dismissed employee alleged wrongful dismissal, either at common law or possibly under section 25 of the Act. But it was the fact that the issues to be determined in the wrongful dismissal proceedings were substantially the same as those which were by then before a board of inquiry appointed under the Human Rights Act, which led to the application for a stay, although it is true that as part of his argument, counsel for the employer also asserted that the statutory framework for resolving employment disputes under the Act deprived the court of jurisdiction to entertain a wrongful dismissal claim. I am not at all surprised that Kawaley J rejected that assertion, and respectfully agree with his finding. It is important to remember that Kawaley J was dealing with a claim for wrongful dismissal, not a claim for unfair dismissal under the Act, even though it appears that at one stage counsel for the employer was treating the concepts of wrongful dismissal and unfair dismissal as if they were one and the same. But Kawaley J did not and did not need to make any finding as to whether a claim for unfair dismissal under the Act could be pursued through the courts. That was not the issue before him.

The Constitutional Argument

27. Mr. Diel also sought to place reliance upon the fact that Kawaley J had, not surprisingly, taken the view that very clear statutory words would be required to interfere with the constitutional right of access to the courts for the determination of civil rights and obligations. Kawaley J commented that counsel for the employer could point to no illustration of a common law right of action being held to be abolished in such an indirect way.

28. And that particular passage of Kawaley J's judgment demonstrates the importance of the distinction between a common law right of action for wrongful dismissal and the provisions in relation to unfair dismissal created by the Act, which grant new statutory rights not found at common law, and which also provide for the forum to adjudicate upon those rights. In my view, no constitutional rights are breached by the requirement that claims under the Act must be brought by way of complaint to an inspector, followed by a

hearing by the Tribunal. In Bermuda, as in the United Kingdom, Parliament created new statutory remedies, and provided a system outside the ordinary courts through which the new claims were to be pursued. I should add that I do not find this position to be at all inconsistent with the view taken by Kawaley J in *Robinson*. He was considering whether a well established common law right of action could be abrogated by a statute which did not even make reference to such abrogation. I am considering whether a new form of statutory remedy can be pursued in a manner other than that prescribed by the statute creating the remedy.

The Caymanian Authorities

29. Mr. Adamson also relied upon two Caymanian cases, *Roulstone –v- Cayman Airways* [1992-93] CILR 259 and *Thomas –v- Cayman Islands National Insurance Company* [2007] CILR 96. Those cases took the same position in relation to the unfair dismissal provisions of the Cayman Islands Labour Law of 1987 as had been taken in the United Kingdom. In *Roulstone*, Schofield J said:

> "This court does not recognize unfair dismissal as a cause of action. An employee who is wrongfully dismissed has his remedies before this court at common law. But the common law does not provide a remedy for unfair dismissal. Unfair dismissal is recognized by the Labour Law and the remedy open to an employee under that Law is a complaint to the Director of Labour, and thereafter, by a party aggrieved by the Director's decision to an Appeals Tribunal."

And in *Thomas*, Sanderson AJ referred to the argument that the language of the Labour Law was permissive, insofar as it stated that an employee "may file a complaint". Sanderson AJ dealt with that argument in these terms:

> "The plaintiff submits that the language is permissive and does not require her to make a claim to the Labour Tribunal. I disagree. I

accept that Schofield, J.'s analysis was correct. These claims are not ones that are part of a common law claim for damages for wrongful dismissal. They are created by statute which expressly provides that if an employee decides to make such a claim, he or she has the right to apply to the Labour Tribunal. Accordingly, this claim must fail."

30. That approach is of course consistent with the United Kingdom position. Mr. Diel submitted that the Cayman Islands judges had effectively made the word "may" mandatory. That ignores the statutory regime. What they said (with which I respectfully agree) is set out in the extract from the judgment of Sanderson AJ quoted above, and it is a mischaracterisation to say that the words used have the effect of making the word "may" mandatory.

Finding

31. Although paragraph 8 of the statement of claim does not refer in terms to the unfair dismissal provisions of the Act, there can be no other reason for relying upon the Act save to found a claim for unfair dismissal. Such a claim is unknown to the common law. It is a creature of statute and can only be pursued following the procedures provided for in the Act. I therefore find that the effect of the passing of the Act in Bermuda is as I have found the position to be in the United Kingdom, as set out in paragraph 20 above. It follows, in my view, that a claim before this Court which ignores the procedures provided for in the Act is abusive, and I do, therefore, strike out paragraph 8 of the statement of claim, as sought in Mr. Adamson's summons, on the basis that such a claim is bound to fail. For the avoidance of doubt I would just refer to two further matters. First, there is no question of any of the provisions of the Act being imported into the contract of employment. Like Lord Millett, I would reject such a proposition. And secondly, Mr. Thomas does of course remain free to pursue his wrongful dismissal claim.

Costs

32. I would expect costs to follow the event, and would make an order for costs on a nisi basis, to the effect that the Company should have its costs of this application, payable by Mr. Thomas. That order nisi will become absolute in 14 days' time in the absence of an application. So far as the second and third defendants are concerned, I was not addressed by Ms. Fahy in relation to the merits of the application. My reaction is that no order for costs would be appropriate in relation to what was essentially a watching brief, but I grant liberty to apply in case the matter is pressed.

Dated this day of December 2009.

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Hon. Geoffrey R. Bell
Puisne Judge