



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

**2009: 245**

BETWEEN:

WENDY ALI ROBINSON

Plaintiff

-v-

THE MINISTER OF EDUCATION

1<sup>st</sup> Defendant

-and-

BOARD OF GOVERNORS OF CEDARBRIDGE ACADEMY

2<sup>nd</sup> Defendant

## **RULING ON STRIKE-OUT APPLICATION**

(In Chambers)

Date of Hearing: January 28, March 8, 2011

Date of Judgment: April 4, 2011

Ms. Victoria Pearman, Juris Law Chambers, for the Plaintiff

Mr. Martin Johnson, Attorney-General's Chambers, for the 1<sup>st</sup> Defendant.

## **Introductory**

1. The present action was commenced by Generally Indorsed Writ of Summons issued on July 27, 2009. The Statement of Claim was filed on October 25, 2010. By Summons issued on October 29, 2010, the 1<sup>st</sup> Defendant applied to strike-out the Writ and Statement of Claim on the grounds that, *inter alia*, they disclosed no reasonable cause of action.
2. After initial argument on January 28, 2011, the strike-out application was adjourned to enable the Plaintiff to file an Amended Statement of Claim. This was done on February 17, 2011. The Amended pleading did not allay the 1<sup>st</sup> Defendant's concerns; the application was renewed on March 8, 2011.
3. The Plaintiff's claim is that she was employed by the Government as a school teacher between September 1, 1989 and August 31, 2008, working at Cedarbridge Academy from September 1, 1997 to August 31, 2005. It is alleged that the 1<sup>st</sup> Defendant was her employer and owed duties to her under the Occupational Health and Safety Act 1982 ("the Act"). In breach of applicable statutory duties under the Act, she claims that the Minister failed to provide a safe place of work as a result of which she suffered "*acute respiratory problems caused by a presence of mould and other substances ("irritants") present in the Building...*"
4. The 1<sup>st</sup> Defendant contends that no liability arises under the statutory provisions relied upon in support of the Plaintiff's claim.

## **The Plaintiff's case under the Act**

5. Under paragraph 2 of the Amended Statement of Claim, it is alleged that the "*1<sup>st</sup> Defendant as the employer of the plaintiff was under an obligation to provide her, so far as reasonably practical, the health, safety and welfare at work as provided by The Occupational Safety at Work Act 1982...[In contravention of sections] 3(1), (2)(a), (d), (e) and (f) of the Act the 1<sup>st</sup> Defendant failed to provide a safe place of employment...*"

## **The 1<sup>st</sup> Defendant's grounds for seeking to strike-out the Plaintiff's claim**

6. At the initial hearing, the 1<sup>st</sup> Defendant's counsel relied on a single strike-out ground set out in written 'Submissions on Behalf of First Defendant'. The point taken was that liability under the Act only extended to "*each person who has, to any extent, control of premises to which this section applies*" (section 5A(2) of the Act). It was submitted that the 2<sup>nd</sup> Defendant had sole control of the relevant school premises under the Education Act 1996. This point did not seem plain and obvious as the Minister appeared to have arguably been both (a) the Plaintiff's employer, and (b) to have had some control, albeit to an uncertain extent, over the premises.

7. At the resumed hearing, Mr. Johnson advanced an alternative point (to which Ms. Pearman was afforded 14 days to respond in writing). This was that the Act created no liability; this was achieved only through the non-retroactive Regulations with effect from 2009, after the relevant employment period. He referred the Court to the following crucial provision in the Act:

**“Civil liability**

*22 (1) Nothing in this Act shall confer a right of action in any civil proceedings in respect of any failure to comply with any duty imposed by sections 3, 4, 5 and 7 or any contravention of section 6.*

*(2) Breach of a duty imposed by any regulations made under this Act shall, so far as it causes damage, be actionable except in so far as the regulations provide otherwise.*

*(3) Subsections (1) and (2) are without prejudice to any right of action which exists apart from this Act.*

*(4) Any term of an agreement which purports to exclude or restrict the operation of subsection (2), or any liability arising by virtue of that subsection, shall be void, except in so far as the regulations provide otherwise.*

*(5) In this section "damage" includes the death of, or injury to, any person (including any disease and any impairment of a person's physical or mental condition).” [emphasis added]*

8. It is plain and obvious that no civil cause of action exists for breach of section 3 of the Act. Only breaches of duties imposed by regulations made under the Act are actionable. The Regulations became operative on October 23, 2009, after the pleaded period of the Plaintiff’s employment with the 1<sup>st</sup> Defendant. The Plaintiff had no or no arguable response to these compelling arguments.

**Conclusion**

9. That portion of the Plaintiff’s claim which relies on an alleged breach by the 1<sup>st</sup> Defendant of civil law duties arising under the Occupational Health and Safety Act 1982 is struck-out on the grounds that it discloses no reasonable cause of action, under the provisions of Order 18 rule 19(1)(a) of the Rules of the Supreme Court and/or under the inherent jurisdiction of this Court. This finding is of course entirely without prejudice to the Plaintiff’s claim in negligence for alleged breaches of the corresponding employer’s common law duties of care.

10. Unless either party applies to be heard as to costs by letter to the Registrar within 21 days, the costs of the present application shall be awarded to the 1<sup>st</sup> Defendant to be taxed if not agreed on the standard basis.

Dated this 4<sup>th</sup> day of April, 2011 \_\_\_\_\_  
KAWALEY J