In The Supreme Court of Bermuda

CIVIL JURISDICTION

2016 No: 218

BETWEEN:

DAVID LEE TUCKER

Plaintiff

And

HAMILTON PROPERTIES LIMITED

Defendant

CHAMBERS RULING

Application to strike out and Elements of the law on strike-out (RSC 18/9)
Wrongful Dismissal and Unfair dismissal claims
Discrimination on basis of 'age', 'disability' and 'place of origin' (Human Rights Act 1980)

Date of Hearings:	Thursday 26 October 2017 and Tuesday 31 October 2017
Date of Ruling:	Monday 11 December 2017
Plaintiff	Ms. Sara Tucker (Trott & Duncan Limited)
Defendant	Mr. Matthew Godfrey (Appleby (Bermuda) Limited)

RULING of Registrar Shade Subair Williams

Introductory

1. The Parties in this matter appear before the Court on the Defendant's summons, dated 31 August 2017, for an order to strike out the Plaintiff's Re-Amended Writ of Summons pursuant to Order 18 Rule 19 of the Rules of the Supreme Court 1985 (RSC O.18/19).

2. The Defendant's application to strike out the Plaintiff's claims is made on the following grounds:

   (i) It discloses no reasonable cause of action;
   (ii) It is scandalous, frivolous and vexatious;
   (iii) It is an abuse of process; and
   (iv) It is misconceived and unsustainable

Background Facts

3. The Plaintiff was employed by the Defendant hotel where he worked as a bartender for a period just exceeding 10 years. By written notice, dated 17 December 2015, the Defendant was summarily dismissed from his employment.

4. On the case pleaded by the Defendant, the Plaintiff's termination resulted from serious misconduct. However, the Plaintiff alleges that he was mistreated during the course of his employment and that the true reasons for his dismissal were muffled behind what was stated in the written termination notice.

5. According to the Plaintiff, his physical disability and his age were the real reasons for his summary dismissal. The Plaintiff complains that he was expected to carry heavy objects in contravention of the express terms of the Agreement. His inability to do so was attributable to the seniority of his age and diagnosed back ailments.

6. The Plaintiff also claims that the other concealed reason for his sudden dismissal was owing to his place of origin and his affiliation with the well-known controversy concerning a presentation on the subject of homosexuality delivered by a non-Bermudian guest speaker named Ayo Kimathi.

7. The Plaintiff was also a Shop Steward of the Bermuda Industrial Union. It is against this background that he also claims discrimination by reason of his union affiliation.

8. Counsel for the Defendant/Applicant, Mr. Godfrey, submits that the recoverable loss for the breach of contract claims is below $25,000. Accordingly, Mr. Godfrey invites this Court to send this matter to the Magistrates' Court for final determination if the discrimination claims are struck out.

The Law on Striking out Pleadings (RSC O.18/19)

Strike out RSC Order 18/19(1)

9. RSC Order 18/19(1) provides that the Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of the writ in the action, or anything in any pleading or in the indorsement, on the ground that:
   a) it discloses no reasonable cause of action or defence, as the case may be;
   b) it is scandalous, frivolous or vexatious;
   c) it may prejudice, embarrass or delay the fair trial of the action; or
   d) it is otherwise an abuse of the process of the court

10. RSC Order 18/19(1) also empowers the Court to make an order for the action to be stayed or dismissed.

General Approach

11. The principles of law applicable to the strike-out of a claim were no source of contention between the parties. This area of the law has been well recited in previous decisions of this Court. In general synopsis, strike out applications ought not to be misused as an alternative mode of trial. It is not a witness credibility or fact finding venture and for good reason. The evidence before the Court at this stage is not oral and has not yet been tested through cross-examination. A strike out application, in reality, is a component of good case management. Where the pleadings are so bad on its face and so obviously bound for failure, the Court should strike it out.

12. That is not to say that a strike-out order should stand as the remedy for a badly pleaded statement of claim which can be cured by an amendment (see *Dow Hager Lawrance v Lord Norreys and Others HL 1890 [Vol XV] 210*) On the other hand, the inference to be drawn from facts unsupported by the affidavit evidence may be either the evidence was not deemed sufficient or important enough to be put forward or it was known that the asserted facts were incapable of being proved.

13. In *Electra Private Equity Partners (a limited partnership) v KPMG Peat Marwick [1999] EWCA Civ 1247 p.613* Auld LJ said, "*It is trite law that the power to strike-out a claim under RSC Order 18 Rule 19, or in the inherent jurisdiction of the court, should only be exercised in plain and obvious cases. That is particularly so where there are issues as to material, primary facts and the inferences to be drawn from them, and where there has been no discovery or oral evidence. In such cases…to succeed in an application to strike-out, a defendant must show that there is no realistic possibility of the plaintiff establishing a cause*

of action consistently with his pleading and the possible facts of the matter when they are known. Certainly, a judge, on a strike-out application where the central issue is one of determination of a legal outcome by reference to as yet undetermined facts, should not attempt to try the case on the affidavits…There may be more scope for an early summary judicial dismissal of a claim where the evidence relied upon by the Plaintiff can properly be characterised as shadowy, or where the story told in the pleadings is a myth and has no substantial foundation…

However, the court should proceed with great caution in exercising its power of strike-out on such a factual basis when all the facts are not known to it, when they and the legal principle(s) turning on them are complex and the law, as here, is in a state of development. It should only strike out a claim in a clear and obvious case. Thus, in McDonald's Corp v Steel [1995] 3 ALL ER 615 at 623, Neill LJ…said that the power to strike out was a Draconian remedy which should be employed only in clear and obvious cases where it was possible to say at the interlocutory stage and before full discovery that a particular allegation was incapable of proof.

Determination of a strike-out application is a component of active Case Management

14. The Court's determination of a strike-out application is a component of active case management. Essentially, the Court is required to identify the issues to be tried at an early stage of the proceedings and to summarily dispose of the others. This is aimed to spare unnecessary expense and to ensure that matters are dealt with expeditiously and fairly.

15. As a starting point, the Court must have regard to the Overriding Objective stated at RSC Order 1A:

1A/1 The Overriding Objective

(1) These Rules shall have the overriding objective of enabling the court to deal with cases justly.

(2) Dealing with a case justly includes, so far as is practicable-

(a) ensuring that the parties are on equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate-

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv)to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases

1A/2 Application by the Court of the Overriding Objective
2 The court must seek to give effect to the overriding objective when it-
(a) exercises any power given to it by the Rules; or
(b) interprets any rule.

1A/3 Duties of the Parties
3 The parties are required to help the court further the overriding objective.

1A/4 Court's Duty to Manage Cases
4 (1) the court must further the overriding objective by actively managing cases.
(2) Active case management includes-

- *a) encouraging the parties to co-operate with each other in the conduct of the proceedings;*
- *b) identifying the issues at an early stage;*
- *c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;*
- *d) deciding the order in which issues are to be resolved;*
- *e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;*
- *f) helping the parties to settle the whole or part of the case;*
- *g) fixing timetables or otherwise controlling the progress of the case;*
- *h) considering whether the likely benefits of taking a particular step justify the cost of taking it;*
- *i) dealing with as many aspects of the case as it can on the same occasion;*
- *j) dealing with the case without the parties needing to attend at court;*
- *k) making use of technology; and*
- l) *giving directions to ensure that the trial of a case proceeds quickly and efficiently*

16. In *Jim Bailey v Wm E Meyer & Co Ltd [2017] Bda LR 5 at paras 14-15* the learned Hon. Chief Justice, Ian Kawaley, examined the impact of the new CPR regime and the Overriding Objective on strike out applications:

"*…In Biguzzi v Rank Leisure plc [1999] 4 ALL ER 934 (CA), Lord Woolf explained that the CPR introduced an entirely new procedural code. It is true that he stated that pre-CPR authorities would not generally be relevant. But that was in the context of contending that the new regime imposed greater case management powers on the court to prevent delay than under the old Rules. Trial judges, post-CPR, were expected to use these case*

management powers judicially, only striking out as a last resort. It is also important to remember that this reasoning was articulated in a statutory context in which an entirely new procedural code was in force. And the particular strike-out discretionary power which was under consideration in that case was an entirely new one, a power exercisable on grounds of mere non-compliance with the Rules. As Lord Woolf observed (at 939-940):

"Under the CPR the keeping of time limits laid down by the CPR, or by the court itself, is in fact more important than it was. Perhaps the clearest reflection of that is to be found in the overriding objectives contained in Part 1 of the CPR. It is also to be found in the power that the court now has to strike out a statement of case under Part 3.4. That provides that:

'(2) The court may strike out a statement of case if it appears to the court- (a) that a statement of case discloses no reasonable grounds for bringing or defending the claim; (b) that the statement of case is an abuse of the court's process…' [and, most importantly] (c) that there has been a failure to comply with a rule, practice direction or court order.'

Under Part 3.4(c) a judge has an unqualified discretion to strike out a case such as this where there has been a failure to comply with a rule. The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage of the CPR over previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out."

'Reasonable Cause of Action'

17. RSC Order 18/19(2) provides that no evidence shall be admissible on a strike-out application which is made on the basis that no reasonable cause of action has been disclosed.

18. This rule was recognized in in *Broadsino Finance Co Ltd v Brilliance China Automative Holdings Ltd [2005] Bda LR 12*: "*Where the application to strike-out (is) on the basis that the Statement of Claim discloses no reasonable cause of action (Order 18 Rule 19(a)), it is permissible only to look at the pleading*."

19. In *E (a minor) v Dorset CC [1994] 4 All ER 640 at 649, [1995] 2 AC 633 at 693-694*, Sir Thomas Bingham MR stated:

'It is clear that a statement of claim should not be struck out under RSC Ord 18, r 19 as disclosing no reasonable cause of action save in clear and obvious cases, where the legal basis of the claim is unarguable or almost incontestably bad…I share the unease many judges have expressed at deciding questions of legal principle without knowing the full facts. But applications of this kind are fought on ground of a plaintiff's choosing, since he may generally be assumed to plead his best case, and there should be no risk of injustice to

plaintiffs if orders to strike out are indeed made only in plain and obvious cases. This must mean that where the legal viability of a cause of action is unclear (perhaps because the law is in a state of transition) or in any way sensitive to the facts, an order to strike out should not be made. But if, after argument, the court can be properly persuaded that no matter what (within the reasonable bounds of the pleading) the actual facts the claim is bound to fail for want of a cause of action, I can see no reason why the parties should be required to prolong the proceedings before that decision is reached.

20. The White Book (1999 edition) provides at 18/19/10:

"*A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered (per Lord Pearson in Drummond-Jackson v British Medical Association [1970] 1 WLR 688; [1970] 1 All ER 1096, CA). So long as the statement of claim or the particulars (Davey v Bentinck [1893] 1 QB 185) disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak and not likely to succeed is no ground for striking it out (Moore v Lawson (1915) 31 TLR 418, CA; Wenlock v Maloney [1965] 1 WLR 1238; [1965] 2 All E.R. 871, CA): …*"

'***Scandalous, Frivolous or Vexatious***'

Scandalous

21. A complaint that a pleading is 'scandalous' necessarily imports an allegation that the pleading is grossly disgraceful, false and malicious or defamatory. Scandalous claims are irrelevant to the proceedings and are invariably liable to be struck out on the basis that they are improper.

Frivolous and Vexatious

22. Justice Meerabux in *The Performing Rights Society v Bermuda Cablevision Limited 1992 No. 573 at page 31* considered the meaning of 'frivolous' and 'vexatious':

"*…It is pertinent to mention that the words "frivolous or vexatious" mean cases which are obviously frivolous or vexatious or obviously unsustainable. Per Lindley L.J. in Attorney-General of Duchy of Lancaster v L. & N. W. Railway [1892] 3 Ch. 274 at 277.*
Also when "one is considering whether an action is frivolous and vexatious one can, and must, look at the pleadings and nothing else… One must look at the pleadings as they stand." Buckhill L.J. in Day v William Hill (Park Lane) Ld. [1949] 1 K.B. 632 at 642."

However, *Day* pre-dates the 1985 Supreme Court Rules and the new CPR regime which introduced the Overriding Objective. RSC O.18/19(2) only excludes the admissibility of evidence on the grounds that no reasonable cause of action or defence is disclosed. Evidence

may now be filed in support of grounds that the pleadings are 'scandalous, frivolous or vexatious'.

'***Abuse of Process***'

Misuse of procedure

23. In *Michael Jones v Stewart Technology Services Ltd [2017] SC (Bda)*, Hellman J considered the meaning of 'abuse of process' by reference to Lord Diplock's passage in *Hunter v Chief Constable [1982] AC 529 at 536 C*:

    "*It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied*…"

Delay in Prosecution of Claim

24. Kawaley CJ considered the legal principles relevant to a strike out application on grounds of abuse of process in *Jim Bailey v Wm E Meyer & Co Ltd [2017] Bda LR 5 at paras 12-25*. The issue underlying the abuse of process in *Bailey v Meyer* was pinned to delay in the prosecution of the claim. Kawaley CJ summarily rejected the submission that civil want of prosecution was governed by the same law applicable to an accused's constitutional right to be tried within a reasonable time. The Court cited *Biguzzi v Rank Leisure plc [1999] 4 All ER 934 (CA)* where the High Court reversed a deputy district judge's decision to strike out the claim. The reversal on appeal in that case hinged on the Defendant's contribution to the delay in advancing the proceedings exceeded passive assent. See also *Re Burrows [2005] Bda LR 77 (at paragraphs 13-14)* and *Russell v Stephenson [2000] Bda LR 63*.

Mythical Allegations incapable of proof

25. The House of Lords in *Dow Hager Lawrance v Lord Norreys and Others HL 1890 [Vol XV] 210* held:

    "It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved. But the Court of Appeal did not proceed on that ground. They took into consideration all the circumstances of the case. We have, to begin with, a statement of claim which, if it discloses a concealed fraud within the meaning of the statute, does so in the barest fashion, with much that is most material left vague and undefined, when there ought to have been distinctness and precision. Moreover, this is not the first but

the third edition of a statement of claim delivered with the object of recovering the Towneley estate; and when we review the history of the litigation there is much to lead to the belief that important allegations now made were an afterthought, the result of criticisms of the earlier form in which the charges of fraud were presented, and that the charges thus raised against persons long dead are wholly incapable of proof. These impressions might have been dissipated by the affidavits filed on behalf of the appellant; but they have not been. On the contrary, I think they have been strengthened. Both in what it says and in what it does not say, Colonel Jaques' affidavit confirms in my mind the impression that the case has not a solid basis capable of proof, but that the story told in the pleadings is a myth, which has grown with the progress of the litigation, and has no substantial foundation. For these reasons, I concur with the Court of Appeal in thinking that the action is an abuse of process of the Court…"

Summary of the Plaintiff's Pleaded Case

26. The Plaintiff's Re-Amended Generally Indorsed Writ of Summons ("the Writ"), dated 26 January 2017 is pleaded in a format similar to that of a Specially Indorsed Writ of Summons to the extent that it contains a brief Statement of Claim.

27. In the Statement of Claim portion of the Writ, the Plaintiff claimed damages for breach of his employment contract; wrongful dismissal and unfair dismissal in breach of section 28 of the Employment Act 2000. Further, the Plaintiff claims for breach of his human rights contrary to section 2(2) of the Human Rights Act 1981. In addition to his claim for general and special damages, the Plaintiff seeks a declaration that the Defendant discriminated against the Plaintiff.

28. Notwithstanding, the factual basis upon which the Plaintiff brings its case is pleaded in the Re-Amended Statement of Claim ("the RSOC"), dated 26 January 2017, and in the Further and Better Particulars dated 25 June 2017. Affidavit evidence sworn by the Plaintiff himself on 9 October 2017 was filed in defence of the strike-out summons with which I am currently concerned.

29. The Plaintiff's claim for breach of the employment contract is outlined in the RSOC. However, wrongful dismissal is not pleaded in the RSOC. The claim for unfair dismissal, on the other hand, is weeded throughout the RSOC. The allegations of breach of human rights are averred in the RSOC on the basis of 'place of origin', 'age' and 'disability'. A new claim for breach of the Plaintiff's right to 'freedom of association' is pleaded in the RSOC in addition to a new contractual claim for discrimination on the basis of trade union affiliation.

30. The full list of the causes of action pleaded is as follows:

(i) Breach of employment contract;
(ii) Unfair dismissal and wrongful dismissal;
(iii) Unlawful discrimination by reason of age and disability;
(iv) Unlawful discrimination by reason of place of origin;
(v) Unlawful discrimination by reason of trade union affiliation; and
(vi) Breach of freedom of association

The Claims for Breach of Employment Contract

31. Principally, the Plaintiff says that the Defendant failed to offer adequate staffing support and a suitable working environment during the course of his employment. The asserted breaches of the contract include a failure to "maintain the mutual trust and confidence". The breaches pleaded in the RSOC are as follows:

(i) Did maintain an autocratic management style which resulted in the abuse of the Plaintiff as he was shouted at on numerous occasions up to an(d) inclusive of the time immediately before he was terminated regarding a change of the Plaintiff's written job description in contravention of the Collective Bargaining Agreement ("CBA");

(ii) Again and in breach of the CBA the Defendant did not institute a minimum 3 day work week system as outlined in the CBA which required that hotel staff work a minimum of three days for eight hours a day during the off-season between November to April then the return to regular full time work during peak season between May and October.

(iii) Did bully the Plaintiff and caused him to feel targeted because he would not sign for changes in his employment description;

(iv) On Friday 11 December 2015 the Defendant did deceive the Plaintiff into attending a hotel Snowball Party where he was trapped into taking part in a meeting concerning his employment contract;

(v) Did place unwarranted warnings on the Plaintiff's record in an attempt to smear and sully his otherwise unblemished reputation…

32. Further pleaded breaches of the employment contract are said to have occurred prior to the summary dismissal. These include the Defendant's failure to repair the staff punch clock; its failure to provide adequate training (including failure to provide the needed resources for mixing customer cocktails) and failure to take reasonable care in ensuring the Plaintiff's health, safety and welfare at work by requiring the Plaintiff to carry on heavy-lifting despite

his back ailments. The Plaintiff further avers that he was deprived of sufficient support staff in carrying out his duties.

33. The Defendant argued that the alleged breaches are not express terms of the contract. This is curable by amendment. The Collective Bargaining Agreement ("CBA") contains express contractual terms relied on by the Plaintiff. Article 14a) governs the lay-off method as follows, "*The Employer will effect (sic) a system of rotation within departments which will be fair to all employees. Whenever possible. The Employee will endeavor to schedule employees for a minimum of three (3) days per week. When this is not possible, an alternative schedule shall be arranged*."

34. Article 35 of the CBA, in part, required the Defendant to continuously encourage and make arrangements for its employees to undertake training to improve their skills or to better fit them for the performance of their duties and for subsequent promotion. Article 34 applies to safety and health. In my review of the CBA, I did not discover any express provisions relating to the procedure for changing an employee's job description. However, I accept that it is arguable that a unilateral change without consultation is a breach of an implied term arising out of Article 39 on 'Joint Consultation'. Article 36 refers to the agreed disciplinary procedure which contains the warning procedures for lesser serious acts on the part of an employee.

35. A claim for an employee's right to sue his employer for breach of contract can only be based on common law principles. I find that the only common law claims for breach of contract which are not frivolous or vexatious are as follows:

    - The Defendant's failure to institute a minimum 3 day work week system;
    - The Defendant's failure to provide adequate training and support staff to the Plaintiff for the carrying out of his duties;
    - The Defendant's failure to take reasonable care in ensuring the Plaintiff's health, safety and welfare at work by requiring the Plaintiff to carry on heavy-lifting despite his back ailments; and
    - The Defendant's change of the Plaintiff's written job description (without consultation).

36. The remainder allegations for breach of contract are struck out on the grounds that they are obviously frivolous and vexatious. Arguably, the allegation that the Defendant maintained an autocratic management style may be evidence in support of the discrimination claims. However, it does not give rise to a non-frivolous cause of action for breach of contract in this case. Further, the Plaintiff's allegation that Defendant placed unwarranted warnings on his record would only be relevant to the dismissal claims which are addressed further below.

37. The Plaintiff also claims a breach of contractual duty in that the Defendant breached Article 9 of the CBA by discriminating against the Plaintiff because of his affiliation with the BIU. Article 9 reads:

"*There shall be no discrimination against any employee because of membership or non-membership in, or activity on behalf of the Union, provided that an employee's Union activities shall not interfere with the performance of his work for the Employer. It is therefore agreed that all employees covered by this Agreement may become and/or continue to be full members of the Union*."

38. Paragraph 2 of the Plaintiff's Further and Better Particulars state:

"*2.i The Plaintiff has held sustained ties with the Bermuda Industrial Union. Whilst employed at the Defendant Hotel the Plaintiff served as Shop steward on behalf of the unionized workers at the Hotel between January 2014 and December 2015. The Plaintiff first noticed a change in attitude of management staff at the hotel but one in particular was Mario Dietrich, the Food and Beverage Manager.*
ii. The particulars of the discrimination began to manifest itself following industrial action initiated against the Defendant due to the dismissal of several hotel workers out of the scope of the Collective Bargaining Agreement ("CBA"). This action came about as a result of Bermudian bar porter staff being terminated from their positions and the Plaintiff, who was Shop Steward at the time, assisting in galvanizing the workers who downed tools for approximately 10 days in between 28 January and early February 2014.
iii. ...Plaintiff also felt that Mr. Dietrich was very quick to minimalize him and dismiss his views on staff following the strike and this impolite manner worsened once talks regarding changes to the bar areas job description intensified following the industrial action…
v. ...Despite his concerns being aired the Plaintiff's grievances were disregarded leaving him feeling undermined and discriminated against as a Bermudian bartender and Shop Stewart (sic)".

39. Section 28(d) of the Employment Act 2000 excludes an employee's trade union activity as a valid reason for dismissal or the imposition of disciplinary action. However, it is arguable that this claim for breach of contract is separable for the dismissal claims. Put another way, it is not obvious to me that this complaint can only co-exist with a dismissal claim. I, therefore, leave the contractual claim for breach of Article 9 of the CBA for determination by a trial judge.

The Claims for Unfair Dismissal and Wrongful Dismissal

40. I now turn to the claims arising out of the Plaintiff's summary dismissal from his employment by the Defendant.

Unfair Dismissal

41. The unfair dismissal allegation, spiraled throughout the RSOC, latches on to the complaint that the Defendant did not, as an alternative measure to summary dismissal, engage the warning or disciplinary procedures contained in the employment contract and at Article 36 of the CBA.

42. Mr. Godfrey correctly submitted that the Courts have no jurisdiction to hear an unfair dismissal claim, save for the Court's appellate jurisdiction. Sensibly, Ms. Tucker on behalf of the Plaintiff agreed and conceded that such a claim would fail.

43. In *GAB Robins (UK) Ltd v Triggs [2008] ICR 529* Rimer LJ confirmed the UK position as follows: "*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*."

44. Unfair dismissal claims are governed by section 28 of the Employment Act 2000. A claim for unfair dismissal does not exist at common law. This is why such a claim cannot be properly adjudicated in the Court's original jurisdiction. The procedure laid down by the Act must be followed in prosecuting an unfair dismissal claim.

45. An aggrieved employee has a right to complain to an inspector within 3 months of the alleged unfair dismissal. The inspector will then decide, in accordance with section 37, whether to refer the complaint to Tribunal for adjudication. The remedies available to a successful complainant are provided for under section 40 of the 2000 Act.

46. The appellate jurisdiction of the Supreme Court to hear unfair dismissal claims is stated in section 41:

"*41(1) A party aggrieved by a determination or order of the Tribunal may appeal to the Supreme Court on a point of law.*

(2) An appeal under subsection (1) shall be lodged in the Registry within twenty-one days after receipt of notification of the determination or order, or such longer period as the Supreme Court may allow…"

42. For all of these reasons, I find that the unfair dismissal claim necessarily fails.

Wrongful dismissal:

47. Having uncoiled and abandoned the unfair dismissal claim, Ms. Tucker towards the end of the second hearing, stated that she would also withdraw the Plaintiff's wrongful dismissal claim.

48. However, having heard arguments on the Court's jurisdiction to adjudicate dismissal claims, I think it helpful and even important to restate the Court's jurisdiction to hear a wrongful dismissal claim. Mr. Godfrey most ably assisted the Court on the law in this regard.

49. A wrongful dismissal action may be prosecuted at first instance both as a statutory claim before the Employment Tribunal, as established by the Employment Act 2000, and in the Supreme Court's original jurisdiction as a common law claim.

Common Law Claim for Wrongful Dismissal

50. In *Quinton Robinson v Elbow Beach Hotel [2005] Bda L.R. 8* the Defendant asserted that the statutory framework for resolving employment disputes under the Employment Act 2000 deprived the Court of jurisdiction to entertain a wrongful dismissal claim, whether as a common law or statutory wrongful dismissal claim. The Court, in observing that there was nothing in the Act which explicitly prohibited seeking an alternative relief to the relevant provisions of the Act, wholly rejected this submission and held at para 10 on page 4:

"*I found the Plaintiff's submissions on this issue to be compelling. Irrespective of whether his wrongful dismissal claim is based on the common law or section 25 of the 2000 Act itself, in my view very clear statutory words are required to interfere with the constitutional right of access to the Court for the determination of civil rights and obligations under section 6(8) of the Bermuda Constitution as read with article 6 of the European Convention on Human Rights. And Mr. Hastings-Smith could point to no illustration of a common law right of action being held to be abolished in such an indirect way.*"

51. On page 5 at paragraph 30, the Court went on to say:

"*In the employment law context, the common law claim for wrongful dismissal is so well established, that it seems obvious that it can only be abolished by statute. And, in any event, section 6(8) of the Constitution provides that "[a]ny court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial." Accordingly, the determination by an inspector under the Employment Act 2000 that a complaint of wrongful dismissal should be taken no further cannot be construed, as a matter of necessary implication, as a binding adjudication of the Plaintiff's claim which precludes any right of action in the courts. Given the choice between a construction which conforms to and which conflicts with the Constitution, the former must be preferred. Ignoring this rather elaborate analysis, however, as a matter of straightforward statutory construction, it seems impossible to sensibly read the Employment Act as excluding court actions for wrongful dismissal claims that have not been determined by the Tribunal on their merits*."

52. The Court also considered the potential uncertainty of a court action lurking over an employer who reasonably assumes, after the three month limitation period imposed by the Act, that a claim will not be made. At pages 5-6 Kawaley J (as he then was) stated:

"*It may well be unsatisfactory for employers, in terms of uncertainty, that a complaint administratively rejected by an inspector under the Act (or perhaps not made at all), may (up to six years later) potentially have to be resolved in the courts*…
It is ultimately a matter for legislative policy what role the new Tribunal should play in Bermuda employment law in the future. The common law remedy of wrongful dismissal will surely often serve a useful function for large and complex executive employment contracts, of a sort that are not infrequently construed by this Court. Hopefully, this right of action will not be abolished, and Parliament will leave employers and employees free to choose their preferred forum for resolving employment disputes."

53. In *Robinson v Elbow Beach Hotel*, the Court found that the only claim positively asserted was wrongful dismissal at common law: the contract of employment had been prematurely terminated without just cause. Kawaley J remarked in *obiter dictum* that the complaint was arguably a statutory claim as the Plaintiff's argument, in part, was based on the fact that the dismissal took place under section 25 of the Employment Act 2000. Kawaley J also clarified that if the claim was in fact a statutory one, the complaint would necessarily proceed by way of report to an inspector, who in turn might refer the complaint to the Tribunal.

54. Looking at the wrongful dismissal complaint behind the lenses of the common law, Kawaley J referred to previous judicial observations made by *The Board of Trustees of Malborough Girls College v Sutherland [1999] NZCA 149* as follows:

"*A dismiss from employment will be wrongful if two conditions are satisfied: (1) that the employee has been dismissed either before the contract has expired or without requisite notice being given, and (2) that there was no sufficient cause for the dismissal, here serious misconduct. This is long established law as appears for instance from the first and most recent editions of Halsbury's Laws of England and from the first major New Zealand text on labour law published as it happens immediately before the statutory introduction of a personal grievance remedy; Halsbury's Laws of England 1st ed Master and Servant para 215 and 4th ed reissued Employment para 302; and D L Mathieson Industrial Law in New Zealand (1970) Vol 1, 43-53.*"

55. At page 2 in his judgement it is stated, "*Where a claimant, as here, is admittedly dismissed for misconduct, a wrongful dismissal claim stands or falls on the determination of whether the relevant misconduct occurred. In the present case, the board of inquiry was charged, before the issue of the Writ, with determining whether or not the act(s) of sexual harassment on which the Defendant's termination decision was based in fact occurred*."

56. The learned Justice Geoffrey Bell (as he then was) also considered the common law position on a claim for wrongful dismissal. In *Thomas v Fort Knox Bermuda Ltd and others [2009] Bda LR 67*[1] Bell J cited with approval previous judicial reference by Lord Hoffmann in *Johnson v Unisys [2001] ICR 480* to McLachlin J of the Supreme Court of Canada in *Wallace v United Grain Growers Ltd (1997) 152 DLR (4th) I* where it was held that a claim for wrongful dismissal is not concerned with the wrongness or rightness of the dismissal itself.

57. In *Wallace* the Supreme Court of Canada recognized that the law entitles both employer and employee to terminate the employment relation without cause and held that the wrong arises only if the employer breaches the contract by failing to give the dismissed employee reasonable notice of termination. The Canadian Court further held that the remedy for this breach of contract is an award of damages based on the period of notice which should have been given.

58. Paragraph 14 of the first affidavit of Allan Trew, the Director of Community Relations of Hamilton Properties Limited, sworn on 14 September 2017, asserts that the Plaintiff was paid on a weekly basis and would only be entitled to one weeks' notice of termination if it was found that notice was required.

59. Notwithstanding, in this case I am moved to strike out of the wrongful dismissal claim on the basis that the Plaintiff's Counsel withdrew from this cause of action for reasons unexplained to the Court. However, I confirm, as learned judicial authorities have done so

[1] See also Court of Appeal judgment delivered by Evans JA ([2010] Bda L.R. 17)

before me, that the Court has clear original jurisdiction to entertain a common law action for wrongful dismissal.

Statutory Claim for Wrongful Dismissal

60. Contrary to the position on a common law claim for wrongful dismissal, the Court has no jurisdiction to deal with a statutory claim for wrongful dismissal. Such a claim is necessarily based on an alleged breach of section 25 of the Employment Act which reads:

    "*Summary dismissal for serious misconduct*
    25 An employer is entitled to dismiss without notice or payment of any severance allowance an employee who is guilty of serious misconduct-
    (a) which is directly related to the employment relationship; or
    (b) which has a detrimental effect on the employer's business,
    such that it would be unreasonable to expect the employer to continue the employment relationship."

61. On appeal from Bell J's ruling, Evans JA stated at page 8 in the leading judgement of the Court of Appeal, "*The purpose of section, it seems to me, is to enable the inspector and the Tribunal to entertain jurisdiction in cases which are essentially cases of wrongful dismissal. Without this provision a claimant might have to pursue his case of unfair dismissal under the statutory code and bring an alternative claim for wrongful dismissal in the courts. This is obviously undesirable. Section 25 enables such claims to be dealt with in one hearing before the Tribunal. Accordingly, I must not be taken as agreeing with the dictum of Kawaley J in Quinton Robinson v Elbow Beach Hotel [2005] Bda L.R. 8 at page 2 that an action for wrongful dismissal in the courts might perhaps be based on a breach of section 25 of the Act. Although it may make little practical difference, in my opinion an action for breach of contract must be based on common law principles and is not affected by section 25*."

62. Thus, if the Plaintiff intended to pursue a claim for wrongful dismissal based on a breach of section 25 of the Act, the only recourse would be to make a report to the investigating officer within the requisite 3 month period in pursuit of referral to the Tribunal.

63. For these reasons, the Court has no original jurisdiction to adjudicate a statutory claim for wrongful dismissal.

The Claims for Breach of Human Rights

64. The Plaintiff alleges that the breaches of his employment contract, compounded by his summary dismissal, amounted to unlawful discrimination based on his place of origin, his age and his disability in contravention of the Human Rights Act 1981.

65. The Defendant's Counsel argued that Mr. Tucker failed to report any grievances for bullying and discrimination at the time of the alleged acts. Mr. Godfrey submitted that the discrimination allegations are baseless allegations of fraud. Counsel further argued that such allegations should be, but are not, supported by prima facie evidence on the face of the documents before the Court. Mr. Godfrey suggested that such allegations are, therefore, a breach of the Bar code and are also scandalous, frivolous and vexatious and a clear abuse of process.

66. Section 11 of the Barristers' Code of Professional Conduct 1981 (which was not specifically cited by Counsel) reads: "*A barrister must never knowingly assist or encourage any dishonesty, fraud, crime or illegal conduct nor advise his client as to how to violate the law.*"

67. Section 41 provides:

> *"41 A barrister instructed to settle a pleading is under responsibilities to the court as well as to his client. He may not make any allegation unsupported by his instructions. He may not allege fraud unless-*
> *(i) he has clear instructions in writing to plead fraud; and*
> *(ii) he has before him reasonable credible material which, as it stands, establishes a prima facie case of fraud."*

68. Allegations of breach of professional misconduct should not be uttered by barristers in the face of the Court against their learned colleagues without trepidation and care. The regulatory body responsible for complaints of breach of professional misconduct is the Bermuda Bar's Professional Conduct Committee. In any event, I see no cause for complaint against the Plaintiff's Counsel as Mr. Tucker not only put such allegations in writing but swore to the veracity of those allegations in affidavit evidence before the Court. Ms. Tucker is both correct and duty-bound to plead and argue her client's case before the Court.

69. I now move to consider the discrimination allegations for determination on whether such allegations are scandalous; frivolous; vexatious and/or an abuse of process.

70. The Court's jurisdiction to decide human rights complaints at first instance was not challenged by either party. Section 21 of the Human Rights Act 1981 confers an appellate jurisdiction on the Supreme Court from decisions of the Human Rights Tribunal. Appeals may be made on both questions of law and fact.

71. However, section 21 does not confer exclusive jurisdiction on the Tribunal. Section 29 reads:

"Powers of Supreme Court
29(1) In any proceedings before the Supreme Court under this Act ***or otherwise*** *it may declare any provision of law to be inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act unless such provision expressly declares that it operates notwithstanding this Act.*
(2)The Supreme Court shall not make any declaration under subsection (1) without first hearing the Attorney-General or the Director of Public Prosecutions."

72. This Court has previously recognized its original jurisdiction to adjudicate human rights complaints. (See *Richardson v Air Care Ltd [2015] Bda LR 8* where the Plaintiff claimed unlawful discrimination against his employer on the grounds of his Bermudian national origin.) There is also a building history of first instance judicial decisions which hold various provisions of law to be incompatible with the Human Rights Act 1981.

73. Section 2(2) of the Human Rights Act 1981 provides:

"*(2) For the purposes of this act a person shall be deemed to discriminate against another person-*
(a) If he treats him less favourably than he treats or would treat other persons generally or refuses or deliberately omits to enter into any contract or arrangement with him on the like terms and the like circumstances as in the case of other persons generally or deliberately treats him differently to other persons because-
(i) of his race, place of origin, colour, or ethnic or national origins;
(ii) of his sex or sexual orientation;
(iii) of his marital status;
(iiiA) of his disability;
(iv) of his family status;
(v) [repealed by 2013: 18 s.2]
(vi) of his religion or beliefs or political opinions; or
(vii) of his criminal record, except where there are valid reasons relevant to the nature of the particular offence for which he is convicted that would justify the difference in treatment.

(b) if he applies to that other person a condition which he applies or would apply equally to other persons generally but-

(i) which is such that the proportion of persons of the same race, place of origin, colour, ethnic or national origins, sex, sexual orientation, marital status, disability, family status, religion, beliefs or political opinions as that other who can comply with it is considerably smaller than the proportions of persons not of that description who can do so; and

(ii) which he cannot show to be justifiable irrespective of the race, place of origin, colour, ethnic or national origins, sex, sexual orientation, marital status, disability, family status, religion, beliefs or political opinions of the person to whom it is applied; and

(iii) *which operates to the detriment of that other person because he cannot comply with it*."

74. Section 6 is aimed to prevent discriminatory acts by employers. Section 6(1) provides:

"*(1) Subject to subsection (6) no person shall discriminate against any person in any of the ways set out in section 2(2) by-*

(a) refusing to refer or to recruit any person or class of persons (as defined in section 2) for employment;

(b) dismissing, demoting or refusing to employ or continue to employ any person;

(bb)paying one employee at a rate of pay less than the rate of pay paid to another employee employed by him for substantially the same work, the performance of which requires equal education, skill, experience, effort and responsibility and which is performed under the same or substantially similar working conditions, except where the payments are made pursuant to-

(i) a seniority system;

(ii) a merit system; or

(iii) a system that measures earnings by quantity or quality of production or performance;

(c) refusing to train, promote or transfer an employee;

(d) subjecting an employee to probation or apprenticeship, or enlarging a period of probation or apprenticeship;

(e) establishing or maintaining any employment classification or category that by its description or operation excludes any person or class of persons (as defined in section 2) from employment or continued employment;

(f) maintaining separate lines of progression for advancement in employment or separate seniority lists, in either case based upon criteria specified in section 2(2)(a), where the maintenance will adversely affect any employee; or

(g) providing in respect of any employee any special term or condition of employment:

Provided that nothing in this subsection shall render unlawful the maintenance of fixed quotas by reference to sex in regard to the employment of persons in the Bermuda Regiment, the Bermuda Police, the Prisons service or in regard to the employment of persons in a hospital to care for persons suffering from mental disorder."

75. The factual basis for the Plaintiff's discrimination complaints are mostly spelled out in his Further and Better Particulars filed with the Court on 26 June 2017 and in his affidavit evidence.

Unlawful Discrimination by Reason of Place of Origin

76. The Plaintiff's case is that Bermudian members of staff were targeted by management particularly after Bermudian bar porters were terminated from their employment. At paragraph 2iii the Plaintiff pleaded, "*The attitudes and temperament of the hotel management and captains, who are persons directly under management began to shift at this time, particularly against Bermudian staff*." The Plaintiff, having made various verbal complaints to management, complains that he was disregarded by the Defendant and was undermined on account of his Bermudian nationality.

77. I had regard to the evidence of Allan Trew in rebuttal. I accept that there are obvious factual disputes on this ground. However, it is not for me to try and judge this evidence on the affidavits before this Court. In my judgment, this complaint gives rise to a serious issue to be tried.

Unlawful Discrimination by Reason of Age

78. Mr. Godfrey pointed out that 'age' is not included in the catch-all list of heads of discrimination found at section 2(2). Age discrimination is prohibited by section 4 of the 1981 Act in respect of the disposal of premises. It is also an unlawful head of discrimination under section 5 which covers the provision of goods, facilities and services.

79. However, the Human Rights legislation does not render it unlawful for an employer to discriminate against an employee by reason of age. For that simple reason, Mr. Godfrey correctly argued that the Plaintiff's claim for statutory breach on the basis of age discrimination necessarily fails.

80. I find in favour of the Defendant on this ground that the complaint on age discrimination has no chance of success.

Unlawful Discrimination by Reason of Disability

81. The Plaintiff avers that he was diagnosed during his employment with a combination of ailments which included 'spinal kinesiopathology' and 'pathophysiology'; 'neuropathology'; 'myopathology'; and 'histopathology'. Peeling away the unpopular medical terminologies, the Plaintiff professes that he suffered from serious dysfunction to his back caused from spinal misalignment and decay in addition to abnormal nerve and muscle functions.

82. The Plaintiff also argues that the physical dysfunctions to his back qualifies him for inclusion in the statutory definition of 'disability' as stated in the interpretation section of the Human Rights Act:

"*"disability" means the condition of being a disabled person;*
"disabled persons" means-
(a) a person who has any degree of physical disability, infirmity, malformation, or disfigurement that is caused by bodily injury, birth defect or illness, including diabetes, epilepsy, acquired immune deficiency syndrome, human immunodeficiency virus, paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog, wheelchair or other remedial appliance or device;
(b) *a person who has, or has had, a mental impairment and the impairment has, or has had, a substantial and long-term adverse effect on that person's ability to carry out normal day-to-day activities*"

83. The Plaintiff relies mostly on the same facts underlying the breach of contract claim to prove the claim for disability discrimination. The Plaintiff also points to the summary dismissal as evidence to support the claim for discrimination by reason of disability.

84. Section 2(2) includes 'disability' in its list of discriminatory heads. An employer who dismisses an employee by reason of disability does so in contravention of section 6(1)(b) of the 1981 Act.

85. Section 6(9A)-(9C) provides:

"(9A) *For the avoidance of doubt it is hereby declared that nothing in this section confers upon any person any right to employment*.

"(9B) *For the avoidance of doubt it is hereby declared that nothing in this section confers upon any person any right to be given, or to be retained in, any employment for which he is not qualified or which he is not able to perform or of which he is unable to fulfil a bona fide occupational requirement, or any right to be trained, promoted, considered or otherwise howsoever treated in or in relation to employment if his qualifications or abilities do not warrant such training, promotion, consideration or treatment.*

"(9C) *Notwithstanding subsections (9A) and (9B), a disabled person shall not be considered disqualified for an employment by reason of his disability if it is possible for the employer, or prospective employer, to modify the circumstances of the employment so as to eliminate the effects of the disabled person's disability in relation to the employment without causing unreasonable hardship to the employer, or prospective employer."*

86. I have also had regard to the judgment of the former Hon. Chief Justice, Richard Ground, in *Roberts and Hayward v Minister of Labour, Home Affairs & Public Safety and the Chief Fire Officer [2008] Bda LR 47* wherein he referred to these statutory provisions in his consideration of 'disability' under the Human Rights Act 1981.

87. I find that the question as to whether or not the Plaintiff's physical conditions amount to disability and thereby qualify him as a disabled person is a matter for the trial judge. It would also be for the trial judge to determine whether or not the alleged acts on the part of the Defendant occurred and whether such acts amounted to discriminatory behavior in contravention of the Act. These are all issues for trial.

88. For these reasons, I find that the issue of discrimination based on disability is for the determination of a trial judge.

Breach of Rights to Freedom of Association

89. The Plaintiff also claims that the other principal reason for his sudden dismissal was based on his place of origin and his affiliation with the well-known controversy surrounding the presentation delivered by the non-Bermudian guest speaker, Ayo Kimathi on the subject of homosexuality. (See *Ayo Kimathi and David Tucker v The Attorney-General et al [2017] SC (Bda) 30 Civ (28 April 2017) and [2017] CA (Bda) 9 Civ. 17 November 2017)*).

90. The Plaintiff's case is pleaded on the basis of discrimination. It is not the Plaintiff's case that a provision of law has prevented him from exercising his constitutional rights and freedom under section 10(1) of the Constitution of Bermuda to assemble and associate with

Mr. Kimathi. The Plaintiff's case is pleaded on the basis that he was treated unfavourably by his employer, having exercised his freedom of assembly and association.

91. The Constitution of Bermuda enshrines the fundamental rights and freedoms of every person whatever his race, place of origin, political opinions, colour, creed or sex, but subject to the rights and freedom of others and for the public interest. Such rights and freedoms are confirmed by enactments of law. The Human Rights Act 1981 was enacted to make better provisions to affirm the rights and freedoms stated in section 1(b) of the Constitution and to protect the rights of all members of the Bermuda community.

92. Section 10(1) of the Constitution of Bermuda ("the Constitution") provides for the protection of freedom of assembly and association. It reads:

"*Protection of freedom of assembly and association*
10(1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of peaceful assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to political parties or to form or belong to trade unions or other associations for the protection of his interests.

93. Section 2(2)(vi) of the Human Rights Act 1981 (as read with section 6 prohibiting employers from discriminating) protects an individual from being treated less favourably in in his employment on account of that person's religion, beliefs or political opinions. It seems to me that this part of the 1981 Act is, at least in part, relatable to section 10(1) of the Constitution in the sense that both provisions aim to protect an individual's right to unhindered enjoyment of political beliefs.

94. After a few cracks to the shell, it is clear and obvious to me that the inner nut of the Plaintiff's claim is that the Defendant discriminated against the Plaintiff because of his beliefs and political opinions. Therefore, I think this claim is curable by amendment.

95. The Plaintiff, therefore has leave to further amend the Re-Amended Statement of Claim so to plead unlawful discrimination by reason of his beliefs or political opinions in contravention of section 2(2)(vi) of the Human Rights Act 1981 as read with section 6. Such an amendment would replace of the existing claim of a breach of his right to freedom of association.

Conclusion

96. I have struck out the claims for breach of contract on the basis that they are frivolous or vexatious save for the contractual claims alleging the following breaches:
    - The Defendant's failure to institute a minimum 3 day work week system;
    - The Defendant's failure to provide adequate training and support staff to the Plaintiff for the carrying out of his duties;
    - The Defendant's failure to take reasonable care in ensuring the Plaintiff's health, safety and welfare at work by requiring the Plaintiff to carry on heavy-lifting despite his back ailments;
    - The Defendant's change of the Plaintiff's written job description (without consultation); and
    - The Defendant's discrimination against the Plaintiff because of his trade union affiliation with the BIU in contravention of Article 9 of the CBA

97. Leave is also granted for the Plaintiff to amend its breach of contract claims, where needed, to plead any of these terms as implied terms instead of expressed terms.

98. The action for unfair dismissal is struck out on the basis that it is a statutory claim under which the Courts lack original jurisdiction. The wrongful dismissal claim is struck out by agreement between the parties.

99. The age discrimination claim against the Defendant employer is struck out because it discloses no reasonable cause of action. I found that the remaining discrimination claims, (disability and place of origin) are matters for trial. Leave is granted for the Plaintiff to amend the freedom of association claim to pleaded unlawful discrimination based on the Plaintiff's beliefs and/or political opinions.

100. Any request to be further heard on costs or the terms of an Order arising out of this ruling shall be made by the filling of Form 27A[2] within 21 days.

Dated this 11th day of December 2017

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SHADE SUBAIR WILLIAMS
REGISTRAR OF THE SUPREME COURT

[2] Form 27A will be updated and replaced in accordance with a Court Circular to be issued prior to January 2018.