



In The Supreme Court of Bermuda

CIVIL JURISDICTION
2021: No. 350

BETWEEN:

A.B. BINXIANG ZHAO

Plaintiff

- and -

FORTITUDE REINSURANCE COMPANY LIMITED

Defendant

RULING

*Application to strike-out- wrongful dismissal – unfair dismissal – security for costs – Plaintiff
resident outside the jurisdiction*

Date of Hearing (via Zoom): 1 July 2022

Date of Ruling: 13 July 2022

Appearances: **The Plaintiff appears as a litigant in person (with family friend, Ms Betty Zhang)**

Mr J Webster for the Defendant

RULING of Bell AJ

Introduction

1. The parties in this matter appeared before the Court on the Defendant's summons dated 14 June 2022 for an order to strike out the statutory causes of action pleaded in the Plaintiff's Re Amended Writ and Amended Statement of Claim, pursuant to Order 18 rule 19 of the Rules of the Supreme Court 1985. (RSC O. 18 r. 19).
2. In addition, the Court is determining the Defendant's summons of 16 February 2022 pursuant to O.23.r.1 seeking security for costs.
3. The Plaintiff is a litigant in person and requested a "McKenzie friend" a family friend, Ms Betty Zhang. Accordingly, Ms Zhang attended with the Plaintiff via Zoom from Australia.
4. In furtherance of good case management, and in light of the state of the pleadings, it is useful to set out in detail the background of this case and the pleadings to date.

Background Facts

5. The Plaintiff was employed by AIG and subsequently agreed to the transfer of his employment contract to the Defendant, a Bermuda based Reinsurance Company, with a start date in January 2020 to work in Bermuda as an Assistant Actuary. From in or around 1 February 2020 the Plaintiff worked for the Defendant at its offices in Bermuda. Due to the Covid 19 pandemic from 23 March 2020 to the date of termination of employment on 1 September 2021 the Plaintiff lived in South Korea where he worked for the Defendant remotely. He left two suitcases of his personal possessions and effects at the Defendant's offices when he temporarily relocated to South Korea.
6. It is not in dispute that the Plaintiff's relocation to South Korea was a temporary arrangement and that at some point during 2021 the Defendant sought to end that

temporary arrangement and required the Plaintiff's return to Bermuda by 1 September 2021. The Defendant requested the Plaintiff return to the jurisdiction due to the Defendant's tax and legal requirements. The Plaintiff indicated he would return to Bermuda "*as soon as practicable*".

7. The Defendant communicated to the Plaintiff on 26 August 2021 that a failure to return to Bermuda by 1 September would give rise to dismissal for serious misconduct. The Plaintiff in turn indicated an intention to pursue the Defendant for unfair dismissal in the event he was terminated. (Plaintiff's Fifth Affidavit Appendices A-E)
8. The Defendant was diagnosed with generalized anxiety disorder on the 30 August and provided a sick note to the HR department of the Defendant on 30 August and asserts that he had a sick leave entitlement until 8 October 2021.
9. The Plaintiff did not return to Bermuda and he was dismissed by the Defendant with immediate effect for serious misconduct on 1 September 2021.
10. By email to the Defendant on 30 September 2021 the Plaintiff stated (Plaintiff's Fifth Affidavit, Appendix 4-3):

"For avoidance of doubt, FRCL is in breach of

- *my employment contract*
- *Employment Act 2000*
- *Occupation Safety and Health Act 1982*
- *Health Insurance (Cover) Regulations 1971*
- *The doctrine of promissory estoppel on the shipment of my personal belongs and the reimbursement of the approved expenses*

I will be seeking

- *Re-arrangement of the employment*
- *Compensation of losses and damages*
- *Pecuniary penalty to FRCL, its board of directors and employees who are relating to this matter.*
- *Further court orders*
- *Costs"*

11. There was other pre-action correspondence between the parties, and on 1 November 2021 a Generally Endorsed Writ was issued by the Plaintiff against the Defendant and four executives of the Defendant (the Second through Fifth Defendants).

12. A Statement of Claim dated the 20 December 2022 was filed with the Court on 30 December 2021 which largely repeats the claims made in correspondence save with the additional averments of discrimination and bullying. On 18 January 2022 the Defendant's counsel entered an appearance for the Defendant and sought additional time to file a Defence and on 16 February 2022 the Defendant filed an application for security for costs and leave to enter a conditional appearance for the Second through Fifth Defendants, three of whom resided out of the jurisdiction. The Plaintiff had not sought leave of the court before seeking to serve the Second, Fourth and Fifth Defendants out of the jurisdiction and in addition objection was taken to the manner of personal service on the Second through Fifth Defendants.

13. The Plaintiff, by his Fourth Affidavit sworn 22 February 2022 filed evidence objecting to the Defendant's application for security for costs, extension of time for filing defence and leave to enter conditional appearances.

14. By Order of the Chief Justice on 24 February 2022, the Plaintiff was given leave to submit additional evidence in respect of the Defendant's summons seeking security for costs and the Second through Fifth Defendants were granted to leave to enter conditional appearances.

15. On 1 March 2022 conditional appearances were entered for the Second through Fifth Defendants and on 8 March 2022 an Amended Writ was filed by the Plaintiff for the purpose of omitting the Second through Fifth Defendants as parties to the action.

16. On 9 March 2022 the Plaintiff swore his Fifth Affidavit supplementing the evidence sworn in his Fourth Affidavit in respect of the Defendant's security for costs application as per the Chief Justice's Order of 24 February.
17. On 25 March 2022 the Defendant filed an application to strike out the specified statutory claims under O.18 .r. 19 RSC as well as a direction that the claims against the Second through Fifth Defendants had been withdrawn and an order for costs relating to those claims.
18. On 26 April 2022, without leave of the Court, the Plaintiff filed a Re-Amended Writ of Summons. By this re-amended Writ the Plaintiff deleted the entirety of the previous general indorsement. However, the substance of the amendments are not as wholesale as the redlining might otherwise suggest. The Plaintiff, save for his claim to relief under the Health Insurance (Cover) Regulations 1971 for insurance coverage for the month of September 2021 (which claim was deleted in its entirety) does not amend the substance of the relief claimed in the original writ, beyond simply deleting references to the legislation previously relied upon as the foundation for his claims.
19. The Plaintiff, simultaneously with filing the Re-Amended Writ filed an Amended Statement of Claim ("ASOC") on 26 April 2022, in which the underlying basis to his claim for relief was amended with the removal of the statutory claims. He claims to be entitled to the same relief, but arising out of alleged breaches of his contract of employment instead of arising pursuant to statute.
20. The Plaintiff by the Re-Amended Writ and the ASOC has removed the references to the Employment Act 2000, the Human Rights Act 1981, the Occupational Safety and Health Act 1982 and Health Insurance (Cover) Regulations 1971. He is now pursuing damages arising from alleged breaches of his statement of employment and/or contract of employment.

21. The Plaintiff's skeleton argument filed on 30 June 2022, at paragraph 17, states that "*On 26 April 2022, the Plaintiff filed an amended Writ of Summons and Statement of Claim with all claims related to Statutory Laws having been removed. Therefore, there is no dispute in this regard*".
22. However, notwithstanding the Plaintiff's withdrawal or 'removal' of claims related to the 'statutory laws', there were no correlating amendments to the relief and damages claimed by the Plaintiff. Therefore, the primary dispute between the parties during the hearing of the strike out application was whether certain of the relief sought by the Plaintiff could only properly arise under the now withdrawn statutory claims and therefore should be struck out.

Damages and other Relief claimed by the Plaintiff

23. The Plaintiff claims to be entitled to damages and/or rearrangement arising from the breaches and/or injury as follows:
- Damages of \$88,056.28 due to breaches of 2019 Statement of Employment and unlawful discrimination by reasons of origin and race – paragraphs 62 – 68 of the ASOC.
 - Damages of \$411,725.56 "*if the employment would have continued*" – paragraphs 69 of the ASOC.
 - Declaratory relief, compensation (repeating the damages claimed above), and costs - paragraphs 70-73 of the ASOC.

General Approach on a Strike Out Application

24. In *Tucker v. Hamilton Properties Limited* [2017] Bda LR 136, an authority relied upon by both parties, Justice Subair Williams comprehensively sets out the manner in which the Court is to approach a strike out application.

“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. As a starting point, the Court must have regard to the Overriding Objective stated at RSC Order 1A...” (paragraphs 14 and 15)

25. The Defendant has framed his strike out application under RSC O.18 r. 19 on the basis that the statutory claims and corresponding relief should be struck out on the basis of no reasonable cause of action (RSC O.18. r 19 (1)(a) and abuse of process of the Court (r.19(1) (d)).
26. It is not disputed that a significant part of the damages and relief pleaded by the Plaintiff in this action arise from his allegation that he was wrongfully dismissed in breach of contract. He has, quite properly, now abandoned his unfair dismissal claim under the Employment Act 2000, given the lack of original jurisdiction of the Supreme Court to hear this claim. Accordingly, the dispute between the parties on the strike out application is whether certain of the relief claimed by the Plaintiff can only properly arise under the now withdrawn statutory claims and therefore should be struck out.
27. The Defendant for its part asks that damages and relief claimed by the Plaintiff that are only available to the Plaintiff as a statutory remedy for unfair dismissal, (or any other statutory relief from the now withdrawn statutory causes of action) to be struck out.
28. The Plaintiff, for his part, does not specifically address in his skeleton argument the nature of the damages and relief which are properly claimable under his now pleaded causes of action. In oral argument he asserted that he can pursue the damages for failure to reinstate his employment as his *“actual damages”* arising from his dismissal.

Wrongful Dismissal and Unfair Dismissal

29. Justice Subair Williams in *Tucker v. Hamilton Properties* was also concerned with a strike out application in the context of an action arising out of employment. She comprehensively contrasts and explains the differences between the common law cause of action for wrongful dismissal with the statutory remedy for unfair dismissal.

“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.” (Paragraph 45) and

“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...” (paragraph 62)

30. Further, in considering the common law cause of action for wrongful dismissal, Justice Subair Williams refers to the Supreme Court of Canada case *Wallace v. United Grain Growers Ltd* (1997) 152 DLR 1 which was cited with approval by Justice Geoffrey Bell (as he then was) in the *Thomas v. Fort Knox Bermuda Ltd and others* [2009] Bda LR 67. (paragraph 58)

31. In *Wallace*, the Canadian Court held: *“the remedy for this breach of contract is an award of damages based on the period of notice which should have been given”*. (Paragraph 59)

32. Accordingly, in Bermuda it is settled law that in a common law claim for wrongful dismissal the wrong arises only by the employer failing to give proper notice of termination and the remedy is payment in lieu of notice.

33. It was not disputed by the Plaintiff that the contractual notice period under the contract of employment was three months. Indeed, the Plaintiff specifically pleads and relies upon this contractual term and alleges its breach in paragraph 5 (g) as read with paragraphs 60 and 68 of his ASOC. He seeks damages of three months' pay in lieu of notice.

34. Given the above, the additional damages claimed as if "*employment would have continued*" necessarily fails and is struck out. The following paragraphs of the Re-Amended Writ and ASOC are accordingly struck out:

- a. Paragraphs a, d, and preamble to paragraph j and j of the Re-Amended Writ;
- b. Claim for one month payment in lieu of corrective action pleaded in paragraph 68 c and 71 d of the ASOC;
- c. Claim for reinstatement or damages in the alternative of \$365,272.27 pleaded in paragraphs 69, 69 a, and 71 a, and preamble to 71 j and j of the ASOC;

35. In addition, the Plaintiff withdraws his claim under the Employment Act for alleged breach of the Act by terminating his employment during sick leave. Accordingly the following paragraphs of the Re-Amended Writ and the ASOC are struck out.

- a. Paragraph c of the Re-Amended Writ;
- b. Paragraphs 68 b and 71 c of the ASOC

36. The Plaintiff's claims for reimbursement particularized in paragraph 69 b for hospital and dental costs which were incurred after the expiry of the three month contractual notice period are struck out given the Plaintiff's abandonment of the claim under the Health Insurance (Cover) Regulations 1971. In addition, such claim for reimbursement is struck out on the basis the claims will necessarily fail in the wrongful dismissal action as falling outside the contractual notice period.

Security for Costs

37. The Defendant filed an application seeking security for costs on 16 February 2022.

38. The application is made for security pursuant to the RSC Order 23 r. 1, which provides that:

“where on the application of a defendant to an action or other proceedings in the Court, it appears to the Court – (a) that the plaintiff is ordinarily resident out of the jurisdiction ... Then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant’s costs of the action or other proceedings as it thinks just”.

39. The Plaintiff invited the Court to determine that this is not an appropriate case for security for costs, notwithstanding he resides out of the jurisdiction, because he has substantial property in the jurisdiction. The Plaintiff has assets in the jurisdiction in the form of approximately \$1000 in a Bermuda bank account (paragraph 3(f) Fourth Affidavit) as well as his hockey bag and suitcases containing clothing, personal technology and other personal possessions (Fourth Affidavit exhibit) left in Bermuda in March 2020 when he temporarily re-located to South Korea.

40. In *Gill v. Appleby Spurling & Kempe and others* 1999, No 234 [2000] Bda LR 21 Justice Meerabux, in summarizing the principles on security for costs, noted that security will not be required from a person permanently residing out of the jurisdiction if he has substantial property within the jurisdiction *“but the property must be of a fixed and permanent nature which can be available for costs”*. (page 4)

41. In this instance, while the Plaintiff in his Fourth Affidavit valued his personal possessions (clothing, personal technology, sports equipment and sundries) at more than \$10,000 (paragraph 3(c)) and then subsequently in his Fifth Affidavit at \$14,797 (paragraph 22), I

find these are not items of a fixed and permanent nature readily available to meet a costs award.

42. The Defendant has provided evidence that the costs of pursuing any costs order against the Plaintiff in South Korea, should the Plaintiff be unsuccessful, could amount to between \$10,000 to \$50,000. (Third Affidavit of Terry-Lynn Velery Griffiths paragraphs 6 and 7). The Defendant is seeking security in the amount of \$15,000.

43. The relevant principles have been set out in *Gill v. Appleby Spurling & Kempe and others* (pages 2-3) and repeated and relied upon by Justice Hellman in *Galloway v. Roth* [2013] SC (BDA) 81 Civ (paragraph 10) an authority relied upon by the Plaintiff. I paraphrase below:

- a. The Court has a complete discretion whether to order security and it will act in the light of all the relevant circumstances.
- b. The possibility or probability that the Plaintiff will be deterred from pursuing a claim is not, without more, sufficient reason for not ordering security;
- c. The Court must carry out a balancing exercise, weighing the injustice to the Plaintiff if prevented from pursuing a proper claim by an order for security against the injustice to the Defendant if no security is ordered and at trial the Plaintiff is unable to recover the costs incurred by him in the defence of his claim;
- d. In considering the circumstances, the Court is to have regard to the Plaintiff's prospects of success. In doing so the Court does not go into the merits in detail unless it can be demonstrated there is a high probability of success or failure;
- e. The court in considering the amount of security should bear in mind that it can order any amount up to the full amount claimed by way of security, so long as it is not a nominal amount.

- f. Before the court refuses to order security on the basis that it would unfairly stifle a valid claim, the Court must be satisfied that in all the circumstances it is probable that the claim would be stifled. There may be cases where this can be inferred without direct evidence;
- g. The court should consider not only whether the Plaintiff can provide security of their own resources to continue the litigation but also whether the Plaintiff can raise the amount needed from other backers or interested person.
- h. In a case where stifling is alleged (a) *“the Court will require evidence from the Plaintiff to provide the stifling effect of an award”* and (b) *“it is likely to tell against a Plaintiff asserting a stifle if the Plaintiff does not explain who is financing and how is being financed the Plaintiff’s own side of the litigation”* and (c) *“the stifling effect of an award is not alone enough to deter the making of an award for security of costs”*. (see page 3)

Decision on Security

- 44. The Plaintiff is currently resident in South Korea and therefore condition RSC O.23 r.1 (a) is satisfied.
- 45. I am further satisfied, having regard to all the circumstances and specifically the reasons set out below that it would be just to make an order for security for costs.
- 46. So far as the claim by the Plaintiff that an order for security would stifle his claim, I am not satisfied that in all the circumstances it is probable that the claim would be stifled and I take note of the following.
 - a. The Plaintiff is a highly qualified professional, qualified as an actuary;
 - b. He is in South Korea by choice on a temporary visa, choosing to reside in a country he is unable to work or speak the language. (paragraph 4 Fifth Affidavit)

- c. He has been applying for jobs primarily in Bermuda “ *because the remuneration as an actuary for me in Bermuda can support my family financially better than that of other countries*” (Paragraph 3 Fifth Affidavit)
 - d. During the course of the hearing the Plaintiff indicated he is living with family and that his wife is also not working having just had a baby.
 - e. In his Fourth Affidavit (paragraph 3 g) he states he has savings of \$5000 in Korea for the expense of his baby and in his fifth affidavit sworn on 9 March he states that he has now less than \$4000 (paragraph 21) but provides no evidence in his Fourth or Fifth Affidavit of who or how he is being financially supported.
47. The Plaintiff has invited the Court to find that the application for security is made oppressively to delay and hinder the action. I reject this assertion. There is no evidence before me other than the Defendant’s application is made with the predominant view of obtaining security to enable it to enforce any costs award in South Korea. To that extent, the application for security is not made with any intent to delay or hinder a genuine claim and the application for security for costs was made promptly.
48. In considering the circumstances, I have also had regard to the Plaintiffs prospects of success although I have not considered the merits of the surviving actions which were not the subject of the strike out application in any detail.
49. I have, in considering the amount, considered whether or not the Plaintiff can provide the amount needed to pursue litigation himself or from other backers or interested parties. I have inferred from the circumstances set out above that the Plaintiff does have resources he can draw upon from other backers or interested parties in providing security for costs and taken into account that during the course of the hearing the Plaintiff did indicate his belief that given his employment prospects he would be able to meet any order for costs should he be unsuccessful in his claims, with any such costs order likely to be higher than the amount sought as security by the Defendant.

50. Accordingly, in considering these factors, and balancing the interests of the Plaintiff and the Defendant as best I can at this stage of the proceedings, I order that the Plaintiff pay into court or in some other manner as may be agreed, security for costs in the amount of \$7500 payable within 21 days of the date of this Order. This action will be stayed until payment of this sum, with liberty to apply. The Defendant is to file its defence within 14 days of the payment of security by the Plaintiff.

Conclusion

51. For the reasons set out above I order as follows:

- a. Upon the Plaintiff withdrawing all claims or causes of action brought pursuant to the Employment Act 2000, the Human Rights Act 1981, the Occupational Safety and Health Act 1982 and Health Insurance (Cover) Regulations 1971, all claims are struck out to the extent that such claims survive in any form following the Plaintiff's amendments in the Re-Amended Writ of Summons and ASOC.
- b. The following paragraphs of the Re-Amended Writ are struck out in accordance with RSC O. 18 r. 19 that there is no reasonable cause of action:

Paragraphs (a), (c), (d), the unnumbered preamble paragraph to j "*If the Court is persuaded that re-arrangement is not practical then in calculating the appropriate compensation should be based on the basis that in addition to above*", and paragraph (j).

- c. The following paragraphs of the ASOC are struck out in their entirety on the basis that there is no reasonable cause of action:
Paragraphs 68 b, 68 c, 69, 69 a, 69 b, 71 a, 71 c, 71 d, preamble paragraph to 71 j, 71 j.

52. The Plaintiff shall pay into Court or in some other manner as may be agreed by the parties, within 21 days of the date of the Order security for costs in the amount of \$7500. This action will be stayed until payment of this sum, with liberty to apply.

53. The Defendant is to file its defence within 14 days of the payment of security by the Plaintiff.

54. Unless either party seeks to be heard on costs, the Plaintiff shall pay the costs of the Defendant on a standard basis to be taxed by the Registrar if not agreed.

Dated this 12th day of July, 2022

**KIERNAN BELL
ASSISTANT JUSTICE OF
THE SUPREME COURT**