[**2023**] **JMSC Civ 173**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2022CV01205

BETWEEN	**CAMLA JAMES MORRISON**	**CLAIMANT**
AND	**SUTHERLAND GLOBAL SERVICES JAMAICA PLC LIMITED**	**DEFENDANT**

IN CHAMBERS

Mr. Hugh Wildman instructed by Hugh Wildman & Co for and on behalf of the Claimant

Mr. Kwame Gordon instructed by Samuda & Johnson for and on behalf of the Defendant

Dates Heard: April 27, July 5 and September 19, 2023

Civil Practice & Procedure – Striking out statement of case – No reasonable ground for bringing the claim – Claim is frivolous, vexatious or otherwise an abuse of the process of the Court – Civil Procedure Rules 26.3 (1) – Extension of time to file defence – Application for Interim Injunction

PALMER HAMILTON J

BACKGROUND

[1] The Claimant, by way of a Fixed Date Claim Form filed the 20th day of April, 2022 seeks against the Defendant the following reliefs:

> *(a) A Declaration that Noel Kabit Cruz and Andres Felipe Obando Mesa are disqualified from acting and presiding as judges of the appellate tribunal established by the Defendant, to preside over the hearing of the appeal of the Claimant against the decision of the Defendant at first instance, to terminate the services of the Claimant as an employee.*

(b) *A Declaration that Noel Kabit Cruz and Andres Felipe Obando Mesa, being employees of the Defendant, are afflicted by bias by virtue of them being employees of the Defendant, which renders them ineligible to sit and preside over the appeal invoked by the Claimant against the decision of the Defendant to terminate the Claimant from its employment.*

(c) *An injunction, restraining Noel Kabit Cruz and Andres Felipe Obando Mesa from participating in the appeal brought by the Claimant against the Defendant, as a result of the decision of the Defendant to terminate the Claimant as an employee of the Defendant.*

(d) *Costs to be costs in the Claim.*

(e) *Such further and other relief as this Honourable Court thinks fit.*

[2] The Fixed Date Claim Form was supported by an Affidavit sworn to by the Claimant. The Claimant who was employed to the Defendant was terminated after the Defendant received the ruling that was made following a disciplinary hearing pursuant to the Defendant's Disciplinary Policy. The said Disciplinary Policy sets out the appeal process for employees who wish to challenge the decision of a disciplinary panel. Following her termination, the Claimant appealed. The Claimant was informed by the Manager of Human Resources that the appeal will be presided over by three (3) persons, two (2) of whom the Claimant alleges are employees of the Defendant. The Claimant is of the view that if the appeal proceeds with the named panel she would not get a fair trial by an impartial and independent tribunal, which is guaranteed both pursuant to the Constitution of Jamaica and the common law. The Claimant also asserted that, Noel Kabit Cruz and Andres Felipe Obando Mesa, given their connection to the Defendant would have a direct financial interest in the outcome of this matter and would not render an impartial determination in the proceedings. In the alternative, the Claimant further asserted that the presence of Noel Kabit Cruz and Andres Felipe Obando Mesa on the appeal tribunal, raises the apprehension of the real likelihood of bias against her, which would compromise the entire appellate process and deprive her of a fair hearing.

[3] The Defendant filed an Acknowledgment of Service on the 22nd day of April, 2022. However, no Defence was filed.

[4] There are two (2) applications filed in this matter which are before me. In my view, the outcome of one application has a direct impact on the other application, even though it was filed later in time. Therefore, I will deal with the Defendant's application first and then the Claimant's application.

THE DEFENDANT'S AMENDED NOTICE OF APPLICATION FOR COURT ORDERS

[5] The Defendant filed an Amended Notice of Application for Court Orders on the 27th day of October, 2022, seeking the following Orders:

> *(a) The Fixed Date Claim Form filed herein on the 20th day of April, 2022 be struck out.*
>
> *(b) The Cost of this Application be awarded to the Defendant/Applicant to be taxed if not agreed.*
>
> *(c) An Order barring the Claimant/Respondent from bringing any further proceedings against the Defendant/Applicant pending the payment of said Costs.*
>
> *(d) In the alternative an Order permitting the Defendant to file, within fourteen (14) days in the form of an Affidavit or Affidavits, a Defence to this Claim.*
>
> *(e) Such further or other relief as this Honourable Court deems just in the circumstances.*

[6] The grounds on which the Defendant is seeking the Orders are as follows:

> *(a) The Claimant's/Respondent's Claim does not disclose a cause of action.*
>
> *(b) Further or alternatively, the Claimant/Respondent seeks to injunct the Defendant/Applicant in the circumstances where if such an order were to be made, it would be in breach of the contract between the Claimant/Respondent and the Defendant/Applicant, the law and the Labour Relations Code.*
>
> *(c) The Fixed Date Claim Form is frivolous, vexatious and/or an abuse of the process of the Court.*

(d) The Fixed Date Claim Form discloses no reasonable grounds for bringing the Claim.

(e) It is in the interest of justice that the orders being sought are granted.

(f) The Fixed Date Claim Form is inconsistent with the overriding objective.

[7] The Notice of Application for Court Orders is supported by the Affidavit of Chevant Hamilton. Mr. Hamilton stated that the Fixed Date Claim Form does not state a cause of action in tort, contract or otherwise. He further stated that he was informed and verily believes by the Senior Human Resources Executive that Mr. Cruz and Mr. Obando Mesa are not employees of the Defendant. In fact, Mr. Cruz is employed to Sutherland Global Services Philippines Inc while Mr. Obando Mesa is employed to Sutherland Global Services Colombia SAS. Mr. Hamilton further stated that even though the entities belong to the same group of companies of which the Defendant is a member, they are separate legal entities. Mr. Hamilton also stated that he was informed by the Senior Human Resources Executive and verily believes that Mr. Cruz and Mr. Obando Mesa have had no involvement in the disciplinary hearing and neither have they had any prior dealings with the Claimant or any other matter concerning the Claimant.

THE CLAIMANT'S NOTICE OF APPLICATION FOR COURT ORDERS

[8] The Claimant filed a Notice of Application for Court Orders for an interim injunction seeking the following orders:

(a) An Interim Injunction restraining the Respondent, whether by itself, its servants and or its agents, from engaging the services of Noel Kabit Cruz and Andres Felipe Obando Mesa, both employees of the Respondent, from conducting an appeal disciplinary hearing brought by the Respondent against the Applicant, in which the Applicant was found guilty at first instant by a single man panel, unconnected to the Respondent, and which resulted in the Applicant's employment with the Respondent being terminated.

(b) Costs of this Application to be costs in the Application.

(c) Such further and other relief as this Honourable Court thinks fit.

[9] The Application consists of forty-two (42) grounds which is similar to the contents of the Affidavit in Support of the Fixed Date Claim Form and which were outlined above. For brevity, I will only outline the grounds that directly mention the interim injunction. Those grounds are:

> *(a) The Applicant prays that this Honourable Court will grant an Interim Injunction restraining the Respondent from proceeding with the appeal tribunal compromising* [sic] *of Noel Kabit Cruz and Andres Felipe Obando Mesa, who are both employees of the Respondent.*
>
> *(b) The Applicant contends that damages would not be an adequate remedy as any finding adverse to the Applicant by this appeal tribunal, would seriously affect the Applicant's reputation and her ability to seek further employment.*
>
> *(c) The Applicant hereby undertakes to give the usual undertaking as to damages, in the event that the substantive claim, which the Applicant intends to file, is determined against her.*

ISSUES

[10] In relation to the Defendant's Amended Notice of Application for Court Orders, the main issue for my determination is whether the Claimant's statement of case ought to be struck out pursuant to Rules 26.3 (1) (b) and (c) of the Civil Procedures Rules, 2002, as amended.

[11] If I find that the statement of case ought to be struck out, then there would be no need for me to consider the other issues arising in this claim as that would bring the entirety of the claim to an end. However, if I find that the statement of case should not be struck out then I would also have to consider the following issues:

(a) Whether the Court should extend the time for the filing of a Defence pursuant to the Civil Procedure Rules; and

(b) Whether an interim injunction ought to be granted.

SUBMISSIONS

[12] I wish at this time to thank all Counsel involved in this matter for their very helpful written submissions which provided invaluable assistance to the Court in deciding the issues raised in this claim. I also wish to make it known that I carefully considered all the submissions and authorities before me whether they have been referred to or not.

LAW & ANALYSIS

A. *Whether the Claimant's statement of case ought to be struck out pursuant to Rules 26.3 (1) (b) and (c) of the Civil Procedures Rules, 2002, as amended*

[13] The starting point is Rule 26.3 of the Civil Procedure Rules, 2002 (as amended), hereinafter referred to as 'the CPR', which gives the Court the power to strike out a statement of case or part of a statement of case if it appears to the Court –

> *(a) …;*
>
> *(b) that the statement of case or the part to be struck out is an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings;*
>
> *(c) that the statement of or the part to be struck out discloses no reasonable grounds for bringing or defending a claim or*
>
> *(d) ...*

[14] The phrase *'statement of case'* is defined in Rule 2.4 of the CPR as -

> *(i) a Claim Form, Particulars of Claim, Defence, Counterclaim, Ancillary Claim Form or Defence and a Reply; and*
>
> *(ii) any further information given in relation to any statement of case under Part 34 either voluntarily or by order of the court.*

[15] Kodilinye and Kodilinye in their text Commonwealth Caribbean Civil Procedure, 2nd Edition stated that *"the phrase 'otherwise an abuse of the process of the court' is a catch-all provision which encapsulates the general principle underlying the striking-out rules…"* The learned authors of Blackstone's, Civil Practice 2002, 3rd

Edition, at paragraph 33.6 opined that *"a statement of case ought to be struck out if the facts set out do not constitute the cause of action or defence alleged."*

[16] I wish to rely on the words of Johnson J in **Denniehal Myers v Byron Fletcher consolidated with Tanica Jones v Byron Fletcher** [2023] JMSC CIV 123 at paragraph 34, where she stated that:

> *In relation to Rule 26.3(1) (b), to make a determination as to what constitutes an "abuse of the process of the court or a claim that is likely to obstruct the just disposal of the proceedings", the court has to examine the particular facts of the case, as the CPR does not specifically define what is meant by either. The court in Attorney General v Barker [2000] EWHC 453 (Admin) at paragraph 19 defined "abuse of the process of the court" as "the use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process". "Likely to obstruct the just disposal of the proceedings" has been viewed as contemplating a situation where a litigant has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial: See Arrow Nominees v Blackledge and others [2001] B.C. 591.*

[17] It is clear from Rule 26.3 (1) (c) that if the cause of action discloses no reasonable ground for bringing the claim, the Court should have the matter struck out. I find the view expressed by Batts J in **City Properties Limited v New Era Finance Limited** [2013] JMSC Civ 23 to be instructive where he stated-

> *On the issue of the applicable law, the section is clear and means exactly what it says. There must be reasonable grounds for bringing or defending a claim. These reasonable grounds must it seems to me be evident on a reading of the statement of case. It is well established and a matter for which no authority need be cited, that upon an application to strike out pleading, no affidavit evidence need be filed, the issue is determined by reference to the pleadings.*

[18] I wish to rely on Sykes' J (as the then was) interpretation of Rule 26.3 (1) (c) of the CPR which was endorsed by the Court in **Sebol Limited and Another, v Ken Tomlinson (as the Receiver of Western Cement Company Limited) and others**, Supreme Court of Jamaica, Claim No. HCV 2526/2004, delivered on October 9, 2007 and **Sebol Limited and Another, v Ken Tomlinson (as the Receiver of Western Cement Company Limited) and others,** Court of Appeal,

SCCA 115/2007, delivered December 12, 2008. Sykes J stated at paragraph 24 that:

> *Let us look at what rule 26.3 (1) (c) actually says. The rule does not speak of a reasonable claim. It speaks of reasonable grounds for bringing the claim. It would seem to me that simply as a matter of syntax the instances in which a claim can be struck out against a defendant are wider than under the old rules. The rule contemplates that the claim itself may be reasonable, that is to say, it is not frivolous, unknown to law or vexatious, but the grounds for bringing it may not be reasonable. Clearly the greater includes the lesser. Thus if the claim pleaded is unknown to law then obviously there can be no reasonable grounds for bringing the claim. It does not necessarily follow, however, that merely because the claim is known to law the grounds for bringing it are reasonable. The rule focuses on the grounds for bringing the claim and not on just whether the pleadings disclose are reasonable cause of action." It is not in dispute that the causes of action are ones that are not known to law. The Claim is for negligence, breach of constitutional rights and damages flowing from same. The issue is whether the Claimant has reasonable grounds for bringing a claim for those causes of action.*

[19] The Claimant's contention surrounds the issue of bias and she alleges that two (2) of the members of the appeal panel are employees of the Defendant and are not eligible to sit on the panel. The test for bias is well-known and was succinctly said by Harris JA in **<u>Bartholomew Brown and Bridgette Brown v Jamaica National Building Society</u>** [2013] JMCA Civ 15, where she stated that:

> *[18] The law of bias is well settled. There are a number of cases which speak to the fundamental principle that a man cannot be a judge in his own cause, see R v Gough, R v Bow Street Metropolitan Stipendiary Magistrate (No 2), Porter v Magill and Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700. For years a variety of tests have been enunciated in the law of bias. Over the years, as the law developed, the test has continually been redefined. In R v Gough the "real danger" test that a decision maker is biased in the conduct of proceedings before him had been accepted as the true test. This test, however, has been modified to be one, in which, a fair minded, impartial observer, who is cognizant of all the facts of the case, would find that a decision maker is biased: see Porter v Magill.*
>
> *[19] There must be evidence of real bias. Therefore, a party who alleges bias must adduce evidence in proof of such allegation. Mere suspicion on the part of an impulsive or irrational person does not amount to bias see: Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451. The existence of bias must be obvious to a*

> *reasonable man, that is, one who has been classified as a fair minded observer. "The characteristics of the fair minded informed observer are now well understood:- he must adopt a balanced approach and will be taken to be a reasonable member of the public neither unduly complacent nor naïve nor unduly cynical or suspicious," per Lord Bingham in R v Abdroikov [2007] 1 WLR 2679.*

[20] Learned Counsel for the Defendant submitted that in light of the **Labour Relations Code's** prescription, even if it were true that the members of the appeal panel are employees of the Defendant it would not give rise to bias. Section 22 (i) of the **Labour Relations Code**, which is titled 'Disciplinary Procedure,' states that,

> *Disciplinary procedures should be agreed between management and worker representatives and should ensure that fair and effective arrangements exist for dealing with disciplinary matters. The procedure should be in writing and should –*
>
> *(a) specify who has the authority to take various forms of disciplinary action, and ensure that supervisors do not have the power to dismiss without reference to more senior management;*
>
> *(b) indicate that the matter giving rise to the disciplinary action be clearly specified and communicated in writing to the relevant parties;*
>
> *(c) give the worker the opportunity to state his case and the right to be accompanied by his representatives;*
>
> *(d)* ***provide for a right of appeal, wherever practicable to a level of management not previously involved;***
>
> *(e) be simple and rapid in operation.*
>
> ***[emphasis mine]***

[21] In my view, that section is clear. The Labour Relations Code, which has been described as close to law as you can get, provides for members of a company to preside over disciplinary appeals. Therefore, I see no need to embark on a discussion regarding whether Mr. Cruz and Mr. Obando Mesa are qualified to sit on the appeal panel. There are several cases emanating from this jurisdiction regarding the strength of the Labour Relations Code. I am guided by the Court of Appeal in **Jamaica Flour Mills Limited v The Industrial Disputes Tribunal and**

<u>National Workers Union (Intervenor)</u> (2005) UKPC 16, where it was stated at paragraph 6 that:

> *Issues have arisen, also, regarding the effect of the Code and the use that can be made of it in a case such as the present. In paragraph 8 of its Award the tribunal, responding to a submission that the Code was no more than a set of guidelines and was not legally binding, observed that the Code was 'as near to law as you can get'. This observation was endorsed by Clarke J in the Full Court (p.28) and by Forte P (p.6), Harrison JA (p.20) and Walker JA (p.37) in the Court of Appeal. Both in the Full Court and in the Court of Appeal reliance was placed on the Village Resorts Ltd v The Industrial Disputes Tribunal SCCA 66/97 (unreported) in which Rattray P, in the Court of Appeal,* ***had described "The Act, the Code and the Regulations" as providing a "comprehensive and discrete regime for the settlement of industrial disputes in Jamaica" (p.11) and as a "road map to both employers and workers towards the destination of a co-operative working environment for the maximisation of production and mutually beneficial human relationships"*** *(p.10, cited by Forte P in the present case at p.3 of the Court of Appeal judgment). Forte P went on to say that the Code*
>
> > *"…establishes the environment in which it envisages that the relationships and communications between the [employers, the workers and the Unions] should operate for the peaceful solutions of conflicts which are bound to develop." (pp.3 and 4)*
>
> *Their Lordships respectfully accept as correct the view of the Code and its function as expressed by Rattray P in the Village Resorts case and by Forte P in the present case.* ***[emphasis mine]***

[22] Therefore, having regard to the Labour Relations Code, I see no evidence on the Claimant's statement of case which shows that they were previously involved in the disciplinary procedure regarding the Claimant. In fact, the Disciplinary Policy of the Defendant is similar to that of the Labour Relations Code. The Claimant herself signed an employment contract and the Disciplinary Policy of the Defendant thereby formed part of the employment contract. There was even an email that was sent to the Claimant from the Manager of Human Resources which clearly states that the members in question do not work for the Defendant Company but that they are employees of Sutherland Global Services Philippines Inc and Sutherland Global Services Colombia SAS. I see no basis in law for the Declarations that the Claimant is seeking. To grant those Declarations, as Learned

Counsel for the Defendant so rightly submitted, would conflict with the provisions of the Labour Relations Code.

[23] Learned Counsel for the Defendant submitted that in light of the principle emanating from **McDonald's Corporation and Another v Steel and Another** [1995] EMLR 527, the Claimant's claim is incurably incapable of proof and is therefore an abuse of the process of the Court. In that case, the Court of Appeal in dealing with a case of libel, held that there could be no objection in principle to an application being made to the Court on the basis that a statement of case or a defence should be struck out because, as disclosed in the affidavits filed in support, the claim or defence was incapable of proof. The Court of Appeal further stated that one must consider whether or not the statement of case to be struck out is *"…incurably bad because there is no evidence to support…"* In my view, the Claimant's statement of case is incurably bad. I have thoroughly considered the Fixed Date Claim Form and the Affidavit in Support of same, and it is clear that there is no evidence and no evidence that can be forthcoming which will support the claim for bias. I understand the Claimant's position to be that, the fact that Mr. Cruz and Mr. Obando Mesa are employees of the Defendant, then she will not get a fair trial by an impartial and independent tribunal. However, as mentioned earlier the Labour Relations Code is in favour of employees sitting on appeal panels and therefore the Claimant's statement of case must fail.

[24] Learned Counsel for the Claimant relied on the case of **R (on the application of Kaur) v Institute of Legal Executives Appeal Tribunal and Another** [2012] 1 All ER 1435 and submitted that this case is a modern formulation of the bias principle and it cannot be ignored. The main issue in that case was whether the presence of persons who were employed to the respondent gave rise to apparent bias and/or the doctrine of automatic disqualification. The Court of Appeal held that in applying either doctrine, the vice-president of the respondent sitting on the Disciplinary Panel was disqualified as a result of her leading role in the respondent and her inevitable interest in the respondent's policy of disciplinary regulations. In my view, this case does not assist the Claimant. Learned Counsel for the Claimant

submitted that this case demonstrates the connection between the members of the appeal tribunal and the employer would disqualify those members from participating in the appeal hearing against the applicant. However, while I can agree that the case does demonstrate a connection between the members of the appeal tribunal and the employer, the facts of the case are distinguishable from the present case. In **R (on the application of Kaur)**, it was clear that it was due to the role that the vice-president played in the respondent company which disqualified her from being a member of the appeal tribunal and not just her mere connection with the respondent company. In the present case, there is no evidence that Mr. Cruz and Mr. Obando Mesa are in fact employed to the Defendant Company and even if I am wrong and they are, there is no evidence of them playing a leading role in the Defendant Company as was the case in **R (on the application of Kaur)**.

[25] I also thoroughly considered the case of **Carrol Ann Lawrence-Austin v The Director of Public Prosecutions [2020] JMCA Civ 47**, on which Learned Counsel for the Claimant relied. This is a case that surrounded my refusal to recuse myself from a matter which came before me. I am of the view that the case is also distinguishable from the present case, as in that case the Court of Appeal formed the view that it would be prudent to exercise a precautionary approach to disqualify me on the clear possibility of apparent bias given that the matter was one which commenced while I was still employed to and held a senior position at the Office of the Director of Public Prosecutions, and the fact that I was affiliated with an extradition matter subject to similar process as the one that was before me. There is no such evidence on the statement of case before me that the two (2) members of the appeal panel in question had anything to do with the disciplinary process or that they have a leading role in the Defendant Company.

[26] Even if I am wrong on this score, and the Claimant is correct that employees of a company should not sit on the appeal panel, the evidence shows that Mr. Cruz and Mr. Obando Mesa are not employees of the Defendant. Even though they are employees of the group of Sutherland Companies, they operate under their own

legal entity out of the Philippines and Colombia, respectively. That, in my view, would still be incurably bad and therefore would amount to an abuse of the process of the Court.

[27] It is therefore my judgment that, the Claimant's statement of case ought to be struck out, as an abuse of the process of the Court. Even though, striking out is a draconian measure, I am of the view that it cannot be avoided given the circumstances before me. It also logically follows that there is no reason for me to consider the Defendants' application for extension of time and the Claimant's Notice of Application for Court Orders for Interim Injunction. Once the statement of case is struck out, the matter comes to an end.

ORDERS & DISPOSITION

[28] Having regard to the forgoing, these are my Orders:

(1) The Claimant's statement of case stands as struck out.

(2) Costs to the Defendant to be taxed if not agreed.

(3) The Claimant is barred from bringing any further proceedings against the Defendant pending the payment of said Costs.

(4) Permission for leave to appeal not granted.

(5) Defendant's Attorneys-at-Law to prepare, file and serve Orders made herein.