COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2020/CLE/gen/00580

B E T W E E N:

SHAMON RODGERS

Plaintiff

AND

BAHAMASAIR HOLDINGS LIMITED

Defendant

Before: Assistant Registrar, Mr. Renaldo Toote

Appearances: Krystan Butler for the Plaintiff
Joseph Moxey for the Defendant

Hearing Date: 9th December, 2020

RULING

Application to strikeout -- Reclassification of employment duties -- Allegation of breach of employment contract -- Circumstances in which a statement of claim (or portions of it) could be struck out -- Rules of Supreme Court, Order 18 Rule 19.

Toote, Assistant Registrar

The Plaintiff, an employee of Bahamasair Holdings Limited brought an action alleging that the Defendant breached her employment contract upon its decision to reclassify her employment duties after an industrial accident. The Plaintiff suffered injuries to her ankle and neck resulting in several surgeries and long term absences between 2014 and 2018.

Bahamasair applied to have the action against it struck out as it discloses no reasonable cause of action; it is scandalous, frivolous or vexatious or otherwise an abuse of the Court's process.

This action is solely based on whether or not Bahamasair breached Art. 19.14.00 of the Industrial Agreement entered into between themselves and the Airport Airline Allied Workers Union.

This issue dealt with the circumstances in which a statement of claim (or portions of it) could be struck out, and whether the allegations based on a breach of contract should be struck out.

Held: Action to strike out dismissed.

The test to be applied is whether it is "plain and obvious" that the statement of claim discloses no reasonable claim. Only if the action is [certain] to fail because it contains a fundamental defect outlined in Order 18 Rule 19 and/or Order 5 rr. 2 and 4 should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19.

Here, it was not "plain and obvious" that the plaintiff's statement of claim failed to disclose a reasonable claim, having regard to the circumstances in which employment law will consider a breach of employment contract. Nor was it plain and obvious that allowing this action to proceed would amount to an abuse of process. The issue raised by the Plaintiff as to whether or not there is a breach of the employment contract pursuant to the interpretation of the Industrial Agreement is for the trial judge to consider in light of the evidence.

It is not for this [an Interlocutory] Court to strike out the application or determine the plaintiff's chance of success. It is sufficient that the plaintiff has some chance of success. A successful Defendant in a strike out application must demonstrate that (1) the statement of claim on its face is not maintainable; and (2) that an absolute defence exist. Then the Court will be satisfied to strike out a statement of claim.

Cases Cited

Considered: *Dyson v. Attorney- General*, [1911] 1 K.B. 410; *Drummond-Jackson v. British Medical Association*, [1970] 1 All E.R. 1094; *Walsh v Misseldine [2000] CPLR 201, CA; Metropolitan Bank, Ltd. v. Pooley, [1881-85] All E.R. 949 (H.L.); Supreme Court of Judicature Act, 1873.*

Background

[1]. The Plaintiff is employed as a Flight Attendant with the Defendant Company. The uncontroverted facts are sometime in April, 2010 while at work the Plaintiff sustained injuries. Eventually, the Plaintiff underwent

surgery in December, 2014. The Plaintiff returned to work in October, 2015. Upon return, the Plaintiff's injuries were subsequently aggravated on a flight and underwent another surgery in March, 2016. The Plaintiff did not return to work until November, 2019.

[2]. During this time, the Defendant informed the Plaintiff of its decision to reclassify her work duties and transferred her from the Flight Attendant Department to the Front Desk. The Plaintiff objected to the transfer and alleges that it breaches her employment contract which is governed by an Industrial Agreement between Bahamasair Holdings Limited and the Airport Airline and Allied Workers Union dated 1st September, 2013.

[3]. Maintaining her position, the Plaintiff initiated this action by way of a generally indorsed Writ of Summons filed 22 June, 2020.

[4]. The Defendant entered an appearance on 24 July, 2020. On the same date, the Defendant filed a Summons pursuant to Order 18 r. 19 (1) (a), (b) and (d) of the Rules of the Supreme Court (RSC) that the action against the Defendant be struck out as it discloses no cause of action, it is scandalous, frivolous or vexatious or it is otherwise an abuse of the process of the court…

[5]. The Summons to strike out is supported by an Affidavit of Tamara Lightbourne.

Hearing

[6]. The Defendant's strike out application was originally heard on 1st December, 2020. At this hearing, this Court refused to hear the same on the basis that it was premature as 'no statement of claim' was filed. The Defendant sought to argue that the Plaintiff has failed to file a statement of claim within 14 days of the Defendant entering an appearance.

[7]. I note that up to the time of the first hearing, the Plaintiff had not filed a statement of claim in accordance with the RSC. The Plaintiff was ordered to file a statement of claim by the 2nd December, 2020 and the matter was subsequently adjourned until 9th December, 2020.

[8]. At the 2nd hearing, the Defendant maintained its position to proceed on its strike out application having been served with the Plaintiff's statement of claim.

The Issues

The issues that arise are:

1. In what circumstances may a statement of claim (or portions of it) be struck out?

2. Does the Plaintiff's statement of claim disclose a reasonable cause of action?

In what circumstances may a statement of claim (or a portion of it) be struck out?

[9]. Bahamasair's application to have the action dismissed was made pursuant to Order 18 r. 19(1) of the *RSC*. This rule stipulates that a court may strike out any part of a statement of claim that "discloses no reasonable claim". Inasmuch as it is relevant, the applicable rule states:

> **(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any 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; or**
> **(b) it is scandalous, frivolous or vexatious; or**
> **(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 and**
> **may order the action to be stayed or dismissed or**
> **judgment to be entered accordingly, as the case may be.**

[10]. Rule 19(1) of the Rules of Supreme Court is analogous to that of provisions in other Commonwealth jurisdictions and are the result of a "codification" of the court's power under its inherent jurisdiction to stay actions that are an abuse of process or that disclose no reasonable cause of action: see McLachlin and Taylor, British Columbia Practice (2nd. ed. 1979), vol. 1, pp. 19-71. This process of codification first took place in England shortly after the Supreme Court of Judicature Act, 1873, (Eng.) 36 & 37 Vict., c. 66, was enacted.

[11]. It is therefore of some interest to review the interpretation the courts in England have given to their rules relating to the striking out of a statement of claim.

[12]. Prior to the introduction of the *Supreme Court of Judicature Act, 1873* Barristers used a "demurrer" to challenge a statement of claim. (A demurrer is a pleading open to a defendant to admit all the facts that the plaintiff's pleadings alleged and to assert that these facts were not sufficient in law to sustain the plaintiff's case). (See Black's Law Dictionary 4th pocket ed. 2011 p. 219). In other words, a demurrer implies that notwithstanding the facts, there is no legal claim to be made.

[13]. Whenever a demurrer was pleaded, any question of law raised was immediately set down for argument and a decision was instantly made (see *Halsbury's Laws of England* (4th ed. 1981), vol. 36, para. 2, n. 7 and para. 35, n. 5). Essentially, a demurrer does not dispute the facts of the case but contends there is no legal claim notwithstanding the facts.

[14]. Eventually, a formal and technical practice was developed around demurrer and judges were notoriously reluctant to provide definitive answers to the points of law that were raised.

[15]. In **Metropolitan Bank Ltd. v. Pooley** [1881-85] All E.R. 949 (H.L.), the Lord Chancellor explained at p. 951 that "before the Supreme Court of Judicature Act, 1873, courts were prepared to stay a "manifestly vexatious suit which was plainly an abuse of the authority of the court" although there was no written rule stating that courts could do so". The Lord Chancellor noted, at p. 951, that "The power seemed to be inherent in the jurisdiction of every court of justice to protect itself from the abuse of its procedure". That is, it was open to courts to ensure that their process was not used simply to harass parties through the initiation of actions that were obviously without merit.

[16]. As explained in *Pooley*, it was thought best to replace demurrers with an easier summary process for getting rid of an action that was on its face manifestly groundless. It was with this objective in mind that O. 25, r. 4 of the 1883 *Rules of the Supreme Court* came into force, which states:

4. The court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.

[17]. Having regard to the aforementioned, **Chitty J.** in ***Republic of Peru v. Peruvian Guano Co.*** (1887), 36 Ch. D. 489, at p. 496 acknowledged the merits of the new rule:

"… **I think that this rule is more favourable to the pleading objected to than the old procedure by demurrer. Under the new rule the pleading will not be struck out unless it is demurrable and something worse than demurrable. If, notwithstanding defects in the pleading, which would have been fatal on a demurrer, the Court sees that a substantial case is presented the Court should, I think, decline to strike out that pleading; but when the pleading discloses a case which the Court is satisfied will not succeed, then it should strike it out and put a summary end to the litigation."**

[18]. I am of the view that the historical development of O. 25, r. 4 [which is similar to the Bahamas O.18 r. 19] was principally enacted to ensure that the courts' power should only be enacted to address genuine legal issues and to safeguard against "vexatious" actions without legal merit.

Does the Plaintiff's statement of claim disclose a reasonable cause of action?

[19]. In the instant matter, the Defendant argues that the circumstances presently before the Court dictates the necessity to invoke its inherent jurisdiction to prevent an abuse of its power. Counsel for the Defendant submits that the Plaintiff's entire claim is predicated upon the misrepresentation of Art. 19.14.00 of the Industrial Agreement entered into between themselves and the Airport Airline Allied Workers Union.

[20]. In **Walsh v Misseldine** [2000] CPLR 201, CA, **Brooke LJ** held that:

"...when deciding whether or not to strike out, the court should concentrate on the intrinsic justice of the case in the light of the overriding objective, take into account all the relevant circumstances and make 'a broad judgment after considering the available possibilities.' The court must thus be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of claim is incurably bad; or that it discloses no reasonable ground for bringing or defending the claim; or that it has no real prospect of succeeding at trial."

[21]. The crux of the Plaintiff's statement of claim is found at paragraph 37 of the claim wherein it states:

> **37. The Defendant, its servants or agents breached the Plaintiff's contract of employment in so far as:**
>
> **i. Reclassifying the Plaintiff without following the procedure as outlined in the Industrial Agreement pursuant to Article 19.14.00.**

[22]. The Defendant argues that this cause of action is otiose and trite at best having regard to other salient portions of the Industrial Agreement which gave the Defendant certain inalienable rights to reclassify.

[23]. Herein lies the problem. The determination of the Plaintiff's issue is incumbent upon interpretation of an agreement; likewise, in order for the Defendant to advance an immutable defence, the Court must consider other relevant portions of the Industrial Agreement.

[24]. If I [in my limited capacity as a Registrar] were to consider the Defendant's proposition, I am of the belief that I would be acting outside the scope of my authority.

[25]. In order to determine whether or not the Plaintiff's case is trite at best, it would entail this Court having to conduct a summary trial on the legal merits of the case. I believe that the plethora of local and foreign case law have properly considered that this power of arresting an action and deciding it without trial is one to be used very sparingly. They have laid down again and again that this process is not intended to take the place of the old demurrer by which the defendant challenged the validity of the plaintiff's claim as a matter of law. See **Dyson v. Attorney- General** [1911] 1 K.B. 410.

[26]. Indeed, a Registrar does have jurisdiction to hear an O. 18 r. 19 application, however, I am of the view that any conflict of law or facts, ought to be decided by trial, and not to be refused on an interlocutory application. I attribute this to the dicta of Smith, LJ. in **Drummond-Jackson v British Medical Association** [1970] 1WLR (688) wherein he held:

> **"It seems to me that when there is an application made to strike out a pleading and you have to go to extrinsic evidence to shew that the pleading is bad, that rule does not apply."**

[27]. In fact Lindley, M.R. made it clear in **Hubbuck & Sons, Ltd. v Wilkinson, Heywood & Clark Ltd.** [1899] 1 Q.B. 86(CA) that "even if the rule expanded the court's power to stay actions, courts were to use the rule only in exceptional circumstances where it was 'plain and obvious'".

[28]. There is nothing plain and obvious as it concerns the legal interpretation of an Industrial Agreement. The Plaintiff's argument may in fact be bound to fail, however, if the Court has to investigate and interpret the legality of the contractual clauses, then the cause of action falls outside of the realm of 'plain and obvious'.

[29]. I am cognizant that the Plaintiff's statement of claim was not aptly drafted and requires amending to bring it into conformity with its written and oral submissions made in objection to this application. Hence, it is not incurable.

[30]. Therefore, the statement of claim should not be struck out and the plaintiff driven from the judgment seat.

[31]. In the circumstances, I dismiss the Defendants application with fixed cost awarded to the Plaintiff in the sum of $500.00.

Dated this 18th day of March A.D. 2021

[Original Signed & Sealed]

Renaldo Toote
Assistant Registrar