COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Public Law Division
2013/PUB/Con/00006

B E T W E E N:

WPC 1896 MARIA DAXON

Plaintiff

AND

1. **DREXEL ARMBRISTER**
2. **DONNELLA BODIE**
3. **ASSISTANT COMMISSIONER HULAN HANNA**
4. **THE COMMISSIONER OF POLICE**
5. **MINISTRY OF NATIONAL SECURITY**
6. **THE DEPARTMENT OF PUBLIC SERVICE**
7. **THE PUBLIC SERVICE COMMISSION**
8. **THE POLICE SERVICE COMMISSION**
9. **THE ATTORNEY GENERAL**

Defendants

Before:	The Honourable Mr. Justice Loren Klein
Appearances:	Kevin Williams for the Plaintiff Sophia Thompson-Williams, Danielle Francis for the Defendants (5 November 2021); Antoine Thompson, Patrick Sweeting (13 June 2022)
Hearing dates:	5 November 2021, further submissions 11th, 18th November 2021 13 June 2022 (oral decision)

R U L I N G

KLEIN J.

Civil Practice and Procedure—Pleadings—Defective Pleadings—Application to strike out writ and statement of claim—Rules of the Supreme Court (R.S.C) 1978—Order 18, r.19, Ord. 31A, r. 20(1)—No reasonable cause of action —Frivolous, vexatious or otherwise an abuse of process—Embarrassing and delaying fair hearing of the action—Striking out principles—Plain and obvious cases—Inter-relationship between Ord. 18, r.19 and Ord. 31A, r. 20(1)—Limitation Act, Ch. 84, s. 12—Multiple causes of action—Breach of Employment Contract—Negligence—Breach of Statutory Duty—Constitutional claims—Discrimination—Protection from Inhumane and Degrading Treatment—Arbitrary arrest and detention—Limitation defence—Public Authorities.

INTRODUCTION AND BACKGROUND

[1] The plaintiff, Ms. Maria Daxon, is a former police officer. Her claims in this action are motivated by numerous grievances against the Royal Bahamas Police Force ("the Force") and eight other public defendants, which she says arise out of the unfair and discriminatory treatment she suffered for nearly two decades while employed with the Force. The defendants are of the view that the causes of action asserted in the claim are untenable and filed an application to strike out her statement of claim on various grounds.

[2] After considering the parties' submissions and the relevant affidavits, I was satisfied that this was an appropriate case in which to exercise the court's strike-out powers. I announced my decision to that effect on 13 June 2022, although I ordered that the effective date of that decision be deferred to the date of the delivery of the reasons. This Ruling sets out my reasons.

Background

[3] Ms. Daxon practices as a counsel and attorney-at-law. In a previous career, she served as a police officer in the Force, where she was enlisted from 22 August 1989 until her retirement on 10 September 2011, after attaining the mandatory retirement age. She was re-engaged on a year-to-year contract until her discharge on the 15 July 2015.

[4] According to the pleadings, during the early years of her employment with the Force—the dates have been given simply as "the 1990's"—she applied for leave to pursue legal studies at colleges and universities locally and in the United Kingdom. She alleges that during the course of her employment she was unfairly denied study leave contrary to departmental policy, denied promotion opportunities afforded to male counterparts, and generally treated unfairly and in a discriminatory manner based on her sex.

[5] Undaunted, she persisted in her quest to obtain academic and legal qualifications for approximately 17 years between 1993 and 2010, eventually obtaining an LL.B from Holborn College, London, United Kingdom. She was subsequently called to the Bar of England and Wales on 22 July 2010, and the Bahamas Bar on 24 September 2010.

[6] It is the treatment allegedly meted out to her during the period of her employment with the Force that she says amounted to various breaches of her contractual, statutory and constitutional rights. This action was commenced by a generally indorsed writ of summons filed 4 March 2013, although (for reasons explained below) the statement of claim was not filed until 14 December 2016.

Procedural background

[7] It is necessary to recount a little of the procedural background to this application to understand the context in which the strike-out application arises. The way in which these proceedings were launched and prosecuted is also littered with irregularities and accounts for some of the delay in its progress. As indicated, the generally indorsed writ was filed March 2013, but the statement of claim was not delivered until December 2016, nearly 3½ years later. Contemporaneously with the filing of the statement of claim, the plaintiff issued a summons, supported by an "affidavit of delay", for an order extending the period for service of the claim. The reason stated in the affidavit was simply that "…*due to severe financial and personal problems*…" the plaintiff was not able to continue with the matter on a timely basis. Notwithstanding the delay in filing the statement of claim, and the fact that it was filed without leave, by summons filed 7 December 2018 the plaintiff applied for leave to enter judgment against the defendants in default of defence pursuant to Order 69, r. 6 of the Rules of the Supreme Court (R.S.C.) 1978.

[8] At a directions hearing on 21 May 2021, it was indicated to the court that the plaintiff had agreed to an extension of time for the defendants to file their defence, and therefore would not be pursuing the default judgment application. Obviously, the plaintiff would have encountered roadblocks in pursuing this application, since the statement of claim was clearly irregularly issued. Further, the action had lain dormant for more than 1 year without any notice to proceed before the statement of claim was issued—an objection which had been taken by the defendants in their summons filed 4 April 2019 seeking an extension of time pursuant to Ord. 3(4)(2) of the R.S.C. to file their defence. In deference to the parties' agreement, the court therefore gave directions for the defendants to file their defence by 18 June 2021 and for the plaintiff to reply by 2 July 2021. The defence was eventually filed on 30 July 2021, and in it the defendants reserved their right "*to take any preliminary point in objection or to seek to strike out the Plaintiff's action*…".

The pleadings and parties

[9] The proceedings were commenced by writ which bore the following general indorsement:

> "The Plaintiff claims against the Defendants jointly and severally and or by way of vicarious liability damages for breach of contract while in the employment of the Fourth, Fifth, Sixth and Seventh Defendants through its servants and or agents while under the Administration, Supervision and Control of the said Defendants wherein and during the course of the Plaintiff's employment the Plaintiff was treated unfairly by reason of discrimination."

[10] The first to fourth defendants in the writ are named public servants; the fifth to seventh defendants are public entities; and the eight defendant is the Attorney General. However, the statement of claim actually names 9 defendants, as the Police Service Commission was added as the 8th defendant, although it does not appear that the writ was ever amended for this purpose. I also pause here to make the observation that the writ only sets out one major cause of action—breach of contract said to be caused by discrimination—although there are multiple causes of action pleaded in the statement of claim. I will return to these issues later in this Ruling.

[11] It is not clear from the introductory averments how the named defendants are connected to the plaintiff's claims and/or the remedies sought. For example, the description of the first defendant is simply that he "*is and was at all times employed as a Human Resource Personnel Supervisor*". As to the second defendant, it is averred that she was "*at all material times employed as the Human Resources Manager and as Permanent Secretary*." The third defendant is Assistant Commissioner of Police Hulan Hanna, who is described as the officer in charge of financial services for "*the* defendant" (presumably the fourth defendant). The fourth defendant is the Commissioner of Police, and he is described as the person responsible for the running of the Force. The fifth defendant is the Ministry of National Security, which is also said to be responsible for the running of the Force. The sixth defendant is the Department of the Public Service, which is said to be responsible for the running of the Human Resource Section at the Police Force. The seventh defendant is the Public Service Commission, which is simply described as being "*responsible for issues that deal with Public Servants matter*" (*sic)*. The eight defendant is the Police Service Commission (the defendant added via the statement of claim), and this body is said to be responsible for issues that "*deal*

with Police matter" (*sic*). The ninth defendant is the Attorney General, responsible for "*providing advice*".

[12] The plaintiff then sets out the following facts regarding the treatment of her application for study leave and promotions within the Police Force, which form the essential factual basis of her claims (quoted elliptically and without editing):

> "1. The Plaintiff, Maria Daxon was…employed by the Fifth and Sixth Defendant from 22nd August 1989 as a Police Officer. […]
> 12. In the early 1900, the Plaintiff applied for study leave to attend the College of The Bahamas to seek to commence study in the Law and Criminal Justice Program. The Plaintiff was denied paid study leave, while three of her male counter parts were given permission to attend the College of the Bahamas to complete their associate degree in law. The Plaintiff had to cease her study because she was not given the time to complete her study and anytime during the time for her to attend classes she was schedule to work, therefore she had to cease with her study at the College of the Bahamas.
>
> 13. The plaintiff applied numerous time for study leave with pay but was denied the same.
>
> 14. The Plaintiff took three promotion examinations and received information from the examination that she received three sets of 90 and the Fourth Defendant and his agents would like to know if she cheated, and therefore they unfairly took away the three examination results without the proper authority.
>
> 15. The Plaintiff applied for promotion three times and was told that no Police Officer who was studying, was given promotion, but some of the male counter parts were able to receive promotion while studying and upon completion of their study.
>
> 19. At all material times the First, Second, Third, and Fourth Defendants were the servant, employees/and or agent of the Fifth and Sixth Defendant.
>
> 20. The loss and damage to the Plaintiff were caused by the negligence, statutory and common law duty, breach of contract, breach of the Plaintiff constitution right not to be unfairly treated on the part of the part of the Defendants, their employees or agents."

[13] The statement of claim then purports to set out particulars of the causes of action mentioned in paragraph 20 of the claim which, for convenience, may be grouped under the heads of: (i) general negligence, (ii) breach of statutory duty, (iii) breach of common law duties, (iv) breach of contract of employment, and (v) breaches of constitutional rights.

[14] Under 'negligence', the plaintiff pleads multiple particulars of negligence against all but the ninth defendant, which are described as generalized failures of the defendants to take certain actions. It is not practical or edifying to attempt to summarize the claims in this regard, but a representative sample might suffice to give a flavor of the overall complexion of the pleadings. For example, the particulars of negligence pleaded against the Fifth Defendant (which I set out without editing) are as follows:

> "**PARTICULAR NEGLIGENCE OF THE FIFTH DEFENDANT**
>
> 29. Further, or in the alternative, the matters complained of were caused by the negligence of the Fifth Defendants in that they:

a. Failed to employ competent employees;
b. Failed to supervise their employees at all time;
c. Failed to put in put a system to deal with unfair treatment in the
d. environment;
e. Failed to initiate an investigation reference to the unfair treatment in the
f. environment;
g. Failed to supervise the First, Second, Third and Fourth Defendants in a manner that is accurate, or at all;
h. Failed to provide the Plaintiff with a safe place or systems or work and exposed him to unnecessary risks;
i. Failed in the circumstances to take any reasonable care for the Plaintiff's safety;

30. The matters complained of were caused by the negligence of the Fifth Defendant which the Plaintiff suffered loss, damages, stress and inconvenience."

[15] Then, for example, the negligent acts of the Sixth Defendant ("the Department of Public Service") are said to include the fact that the Ministry, on 25 January 2012, by correspondence dated 16 December 2011, promulgated a policy paper on the reimbursement of police officers who had undertaken approved courses of study with local or international institutions, which was said to have effected a change in policy. This, the plaintiff contends, amounted to "*a fundamental breach of the contract of reimbursement, as to the implied term that the Defendant would not act so as to damage the relationship of mutual trust and confidence between the Plaintiff and the employer*." Further, it is alleged that the "*defendant's unilateral decision to change the terms and conditions for the reimbursement of degree…was unreasonable in all the circumstances of the case*", which are said to include lack of notice and failure to consult.

[16] The tort of breach of statutory duty is alleged only as against the Fifth and Sixth Defendants, who are said to be vicariously liable in respect of their employees or agents. It is alleged that they "*failed to take reasonable care of the Plaintiff welfare at the work contrary to section 4(1) of the Health and Safety Act*", as a result of which the plaintiff suffered damages, losses, inconvenience and stress.

[17] The claim of breach of "common law duty" is also only directed at the Fifth and Sixth Defendants, and it is alleged that they, *inter alia*, "(*a) failed to provide select competent employees; b. failed to provide a safe system or work; c. failed to provide a safe work environment; d. failed to take care of the Plaintiff's welfare*."

[18] There is also considerable ambiguity in the pleading as to breach of contract. For example, the plaintiff alleges by way of background facts in her statement of claim that she was employed by the "fifth and sixth defendants" from 22 August 1989 as a police officer (para. 1). Later down, it is stated that the plaintiff is a "*retired police officer, still engaged by the Royal Bahamas Police Force*". This was at the time of the filing of the claim, which was 14 December 2016.

[19] Curiously, even though the plaintiff states she was employed by the fifth and sixth defendants, the breach of contract is alleged against *all* of the defendants. This is what appears at para. 16 and 17 of the SOC:

"16. It was an implied term of the Plaintiff's employment, implied as a matter of law or common law that a (*sic*) [to] give efficacy to the contract of employment, that the

> Defendants would not act so as to damage the relationship of mutual trust and confidence between the Fifth and Sixth Defendants and the Plaintiff.
> 17. Because of the breach of contracts while in the Defendants' employment, she was:
> a. unfairly treated while in the employment reference to promotion, back pay, scarcity allowance, examination leave, vacation leave. 7/A increment, wrongful interference with file/records and a series of actions amounting to 'breach of implied term of trust and confidence' on the part of the Defendants."

[20] The factual matters asserted for the breach of contract are that the defendants applied to the plaintiff *"…a provisions, criterion or practice which the Fourth Defendant applies or would apply equally to a man, but…which or would put the plaintiff to a particular disadvantage when compared with a man" (sic)*. Further, as has been noted, there is a claim that the actions of the 6th Defendant amounted to a "*fundamental breach of the contract of reimbursement*", which oddly enough also appears under the particulars of negligence of the sixth defendant.

[21] The plaintiff also pleads, as a separate head of claim, "*injury to feeling*", and alleges that she was subjected to the loss of her dignity in the workplace and subjected to demeaning treatment, which injured her in her reputation, put her to considerable cost, and caused inconvenience and anxiety.

[22] Finally, she alleges that she was also subjected to a number of constitutional breaches, which included the following: (i) breach of her fundamental rights under art. 19(1) and (2) of the Constitution not to be subjected to degrading or inhumane treatment; and (ii) breach of her fundamental rights not to be treated unfairly according to arts. 15, 17 (a) and 26(1) and (2) of the Constitution.

[23] As a result, the plaintiff seeks a number of declarations and damages, which I reproduce as they appear in the statement of claim (again without editing and omitting consequential relief such as costs, etc.):

> "1. The Declaration that the Department of Public Service Circular No. 19 of 2011 File DPS 15/155 dated 16th December 2011 is therefore null and void and no effect to Civil servant who begin their study before 15th December 2011;
> 2. The Declaration that the letter POL/HRM/POL/941 dated 20th January 2011 should not apply to the Plaintiff because it was the information is incorrect;
> 3. The Declaration that the letter POL/HRM/POL/941 dated 20th January 2011 shouldn't apply is statute barred;
> 4. The Declaration that all female police officers should be entitled to benefits male police officers receive before, during and completion of their law study;
> 5. The Declaration that all Defendants be jointly and severally responsible losses and damages for this claim;
> 6. Damages in addition to or in lieu of specific performance;
> 7. Damages for Breach of employers duty;
> 8. Damages for Unfair treatment;
> 9. Damages for victimization;
> 10. Damages for breach of contract;
> 11. Exemplary damages;
> 12. Aggravated Damages."

[24] The defendants filed a conjoined defence. With the exception of a few background facts that were admitted and which are of no consequence, the defence denies most of the averments and allegations contained in the statement of claim. Further, the defendants assert several affirmative defences, including the limitation point, and plead that the plaintiff did in fact receive retroactive study leave for periods when she had in fact taken leave without authorization. As mentioned, no reply was filed and so these allegations were not controverted.

The strike-out application

[25] The strike out application was initially made by the Defendants via summons filed on 4 April 2019, but this was superseded by a summons filed 7 June 2021. The original summons sought in material part the following relief:

> "1. An Order that this action be struck out and/or dismissed pursuant to the inherent jurisdiction of the Court and/or Order 19(1) for non-compliance with Order 18 Rule 1 of the Supreme Court (1978); and/or;
> 2. An Order that the action be struck out pursuant to the inherent jurisdiction of the Court and/or Order 18 Rule 19 (1) (a) on the ground, inter alia, that it is statute barred pursuant to Section 12 of the Limitation Act (CH. 84), and/or Rules 19 (1)(b), (c), and /or (d) of the Rules of the Supreme Court; and/or;
> 3. Alternatively, and in any event that the Plaintiff's action be stayed until the expiration of one (1) months' notice pursuant to Order 3, Rule 6 of the Rules of the Supreme Court (1978); and as a consequence the Summons for Judgment in Default is irregular and should be dismissed; and
> 4. That, without prejudice to (1) above, should the action not be dismissed, that the Defendants be permitted an extension of time pursuant to Order 3(40 (2) of the Rules of the Supreme Court (1978) to file a Defence;…"

[26] The summons of 7 June 2021 was materially similar, except that it omitted paragraph 3, as the relief sought under that head was no longer relevant because of the parties' agreement not to proceed with the default judgment application. In support of their summons, the defendants also filed the affidavit of Kirkland Mackey on the 10 June 2021, and the affidavit of Drexel Armbrister (the first defendant) on 23 August 2021.

STRIKING-OUT PRINCIPLES

The Rules

[27] The rules and principles pursuant to which these applications are to be determined are not in dispute. The defendants' application to strike out was brought under three main grounds: (i) Order 18, r. 19(1) of the *Rules of the Supreme Court* 1978 (R.S.C. 1978), (ii) Ord. 19(1) and 18(1) of the R.S.C.; and (iii) s. 12 of the Limitation Act.

Ord. 18, r. 19 (1)

[28] Order 18, r. 19 of the *Rules of the Supreme Court* 1978, (R.S.C. 1978) provides in material part as follows:

> "19. (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."

[29] A similar power inheres under the inherent jurisdiction of the Court to stay or dismiss actions which are vexatious, frivolous or otherwise an abuse of the process of the Court: see "The Supreme Court Practice 1997", Vol. 1, at para. 18/19/18; *Reichel v Magrath* (1889) 14 App. Cas. 665).

A reasonable cause of action

[30] The requirements of a reasonable cause of action has been described as *"...a cause of action with some chance of success, when…only the allegations in the pleadings are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out": Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094, CA, per Lord Pearson at p. 1101-f.

[31] Thus, the court will strike out the pleading or part of it if satisfied that even if the allegations of fact set out in the pleading are proved, those facts would not establish the essential ingredients of a cause of action. But it will not strike out an action on these grounds if it discloses some cause of action or question fit to be decided by a court, even if the claim is weak (*Davey v Bentick* [1893] 1 QB 185, CA). Neither will the court strike out a claim on the basis of a limitation defence under this rule, as the Limitation Act bars the remedy rather than the claim. But this does not preclude the court striking out based on a limitation defence under other grounds, such as the claim being frivolous or vexatious or an abuse of process (para. 33, *infra*).

[32] No evidence is admissible under this ground (Ord. 18, r. 19(2)), and when considering the pleadings the court is inhibited from conducting a mini-trial on the papers to ascertain whether there is a cause of action (*see Wenlock v Moloney [1965] 2 All ER 871*). But when an application is made under the inherent jurisdiction of the Court, or on any of the other grounds, all the facts can be gone into, and affidavits are admissible: *Willis v Earl Howe* [1893] 2 Ch. 189, pp. 551, 554. The defendants rely on all limbs of Ord. 18, r. 19(1), and they have invoked both the statutory and inherent jurisdiction of the court.

Scandalous, frivolous or vexatious

[33] Cases coming under the umbrella of scandalous, frivolous or vexatious include, for instance, cases which are obviously unsustainable and or spurious, cases brought to harass or embarrass a party, and cases which were viable when instituted but by reason of subsequent events have become doomed to failure ("The Supreme Court Practice 1997" (The White Book), at paras. 18/19/15). However, a pleading or matter will not be struck out solely because it is scandalous or unnecessary, unless the allegations are also irrelevant and to allow them to stand would incur useless expense and involve the parties in unnecessary argument (*Willouby v Eckstein* [1936] 1 All ER 650). The court has also struck out cases under this rule where it was clear that the

defendant intended to avail themselves of a limitation defence (*Ronex Properties v. John Laing Construction Ltd.* (1983) QB 398).

Prejudice, embarrassment or delay

[34] Pleadings which contain vague or imprecise allegations, so that the other party cannot sensibly plead to them, or which contain allegations that are unnecessary, irrelevant or scandalous, or show that the parties have been improperly joined, all come under this head. It has been held in a leading case and reiterated in the case law that a defendant is entitled "…*ex debito justiciae to have the plaintiff's case presented in an intelligible form so that he may not have to be embarrassed in meeting it*": *Davy v Garrett* (1978) 7 Ch. D 473, at p. 486.

Abuse of process

[35] Abuse of process can take many forms and concerns pleadings which involve the improper use of the court's machinery, such as the institution of proceedings for improper or collateral purposes, the bringing of concurrent proceedings in different courts, or attempts to litigate matters already decided ("*res judicata*") or which should have been litigated in previous proceedings (see *Hunter v Chief Constable of West Midlands Police* [1982] AC 529*).*

Ord. 19, r.1 and Ord. 18, r.1

[36] Taken together, these provisions empower the Court to dismiss the action of the plaintiff, or make any other order that it considers just, on an application by the defendant, if the plaintiff fails to comply with the timeline for delivering the statement of claim, which as prescribed by 18, r. 1 is 14 days after the defendant has entered an appearance. This ground does not need any further elaboration in these proceedings. While it is beyond the pale that the plaintiff did not comply with the rules, it is equally trite that any proceedings to set aside, *inter alia*, any steps taken in any proceedings have to be made within a reasonable time and "*before the party applying has taken any fresh step after becoming aware of the irregularity*" (Ord. 2, r. 2(1)). As the defendants have elected to plead over the irregularity by filing a defence, this ground is no longer live.

Limitation Act

[37] The third ground relied on by the defendants is the special limitation protection available to public authorities under s. 12 of the Limitation Act. That provides in material part as follows:

> "12. (1) Where any action, prosecution or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the provisions of subsection (2) shall have effect.
>
> (2) The action, prosecution or proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or in the case of a continuance of injury or damage within twelve months next after the ceasing thereof."

General principles

[38] In addition to the prescribed rules or statutes which enable a party to attack the pleadings of another party for non-compliance, advertence must also be made to the general body of principles governing strike out actions.

[39] The most firmly established and oft-repeated of these is that the jurisdiction to strike out ought to be sparingly exercised and is only intended for plain and obvious cases. This is because striking out applications are draconian in nature, since they have the potential of denying a party the right to trial. Perhaps the most complete exposition of this principle under the former UK Rules of the Supreme Court, which correspond to the 1978 R.S.C., has been given by Lord Pearson in the *Drummond-Jackson* case (*supra*) (pp. 1101-1102). It is a passage which bears setting out in some detail:

> "Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases. […]
>
> In my opinion the traditional and hitherto accepted view—that the power should only be used in plain and obvious cases—is correct according to the evident intention of the rules for several reasons. First, there is in r 19(1)(a) the expression 'reasonable cause of action' to which Sir Nathaniel Lindley MR called attention in *Hubbuck & Sons Ltd. v Wilkinson, Heywood and Clark*. No exact paraphrase can be given, but I think 'reasonable cause of action' means a cause of action' with some change of success, when (as required by r 19(2) only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out. In *Nagel v. Feilden* Danckwerts LJ said:
>
> > 'The summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases, when the action is one which cannot succeed or is in some way an abuse of the process of the court.'
> >
> > Salmon L.J. said:
> >
> > 'It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable.'
>
> Secondly, r 19 (1)(a) takes some colour from its context in r 1991) (b)—'scandalous, frivolous and vexatious'—r 19(1) (c)—'prejudice, embarrass or delay the fair trial of the action'—and r. 1991) (d)—otherwise an abuse of the process of the court'. <u>The defect referred to in r 19 (1)(a) is a radical defence ranking with those referred to in the other paragraphs.</u> Thirdly, an application for the statement to claim to be struck out under this rule is made at a very early state of the action when there is only the statement of claim without any other pleadings and without any evidence at all. The plaintiff should not be 'driven from the judgment seat' at this very early stage unless it is quite plain that his alleged cause of action has no chance of success." [Emphasis added.]

[40] This principle has been consistently applied by our Courts: see, for example, *B. E. Holdings Limited v Lianji (also known as Linda Piao – Evans or Lian Ji Piao – Evans) [2017] 1 BHS J No. 28*, per Charles J (as she then was) [para. 7, 8]; and *Sandy Port Homeowners Association Limited v Bain [2015] 2 BHS J. No. 102*, per Crane-Scott JA [para. 14,18].

[41] However, it is accepted that where the court harbours doubt about the soundness of a pleading and is satisfied that striking out would obviate the necessity for a trial or substantially reduce the burden of preparing for trial, it will invoke its jurisdiction to strike out: *Williams Humbert Ltd. v. W& H Trade Mark (Jersey) Ltd.* [1986] AC 368, 436A, 441 D-H.

[42] Another principle is that the court will generally not strike out a claim which can be remedied by amendment. On the other hand, if it is clear that no amendment, however ingenious, will cure the defect, the Court should dismiss the action and summarily put an end to the litigation: *Griffiths v London Docks Co*., 13 Q.B.D. 259. Further, if matter in the pleadings is so intertwined with the rest of the pleading as to not be severable without difficulty, the whole of the pleading containing it may be struck out: *Williamson v L. & N. W. Ry.*, 12 CH. D. 787.

[43] It should also be borne in mind that length and complexity of a statement of claim, or the fact that the strike-out application might involve prolonged arguments, are not factors which should deter the exercise of the court's jurisdiction to strike out in a proper case. As was said in *Manuel v. Attorney General* [1983] Ch. 77 [at 82], the court:

> "…must beware of any assumption that because a case takes a long time to argue, the points at issue must be doubtful. Arguments must be assessed on their quality rather than on duration, and sometimes the weaker the case the greater the profusion of ingenuity in supporting it."

[44] Importantly, it has also been held that claims seeking relief under Article 28 of the Constitution (i.e., raising issues of fundamental rights) are not immune from the strike-out jurisdiction of the court under *RSC O. 18, R. 19,* or in the exercise of the Court's inherent jurisdiction (see *Maurice Glinton and Leandra Esfakis v. Rt. Hon. Hubert A. Ingraham, et al.,* Privy Council Appeal No. 53 of 2005 (paras. 11-13)).

[45] There, in response to an argument that constitutional claims were not amenable to the Court's strike out jurisdiction under Order 18, r. 19(1)(a), their Lordships said (at paras. 11-13):

> "…the Court of Appeal was right to direct itself that claims should only be struck out in plain and obvious cases and, of course, courts should look with particular care at constitutional claims, constitutional rights emanating from a higher law. But constitutional claims cannot be impervious to the strike out jurisdiction and it would be most unfortunate if they were. It cannot be right that anyone issuing proceedings under article 28 of the Constitution is guaranteed a full hearing of his claim irrespective of how ill-founded, hopeless, abusive or vexatious it may be."

[46] Lastly, the power to strike out is a discretionary power that the court may exercise of its own initiative or on an application by a party. The court's power to strike out is complementary to and a corollary to its case-management powers. In addition to the Ord. 19, r. 19 powers, the court is given specific powers to strike out for failure to comply with a rule, practice direction or court order under Ord. 31A, r. 20(1). In this regard, Charles Snr. J. (as she then was) helpfully reminds us in the *B. E. Holdings Limited* case that the court must also consider the matter in the round and in accordance with modern case management principles:

> "8. In *Walsh v Misseldine* [2000] CPR 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."

The Parties' submissions

The defendants' arguments

[47] The defendants' primary argument is that the statement of claim does not disclose a reasonable cause of action. It is contended that while the plaintiff has pleaded "numerous" causes of action, she has failed to plead the necessary elements required to establish any of them. For example, it is submitted as follows: (i) as to the claim for negligence, the plaintiff does not plead that the defendants or any of them owed a duty of care to the plaintiff which was breached and caused her loss or damage; and (ii) as to the claim for breach of contract, the plaintiff has not pleaded any contractual terms, and more specifically, how any such contract was breached or said not to be performed. In fact, they point out that the closest the plaintiff gets to alleging breach is the allegation that the defendants breached the "*implied term of trust and confidence*" of the contract.

[48] As to the alleged constitutional breaches, the defendants submit that the claims under art. 15, 17(a), 19(1)(2) and 26 have no factual basis in the pleadings, and in any event are irrelevant and embarrassing. A synopsis of the constitutional rights which the plaintiff alleges have been breached are as follows: art. 15, which sets out a preambular entitlement to various fundamental rights and provide for their enforcement; art. 17(1), which guarantees protection from inhuman treatment or torture; art. 19(1), which grants a right to protection from arbitrary arrest and detention; and art. 26(1)(2), which grants a right to protection from discrimination on various enumerated grounds.

[49] The defendants contend that, apart from the bare allegations that these rights have been violated, the plaintiff does not plead how any of these rights have been breached. For example, they submit that the claim of arbitrary arrest and detention is completely irrelevant and inappropriate, as no allegations are made that the plaintiff was deprived of her liberty or detained. And while the plaintiff makes generic allegations of unfair treatment which she says was as a result of her sex, no allegations are made of discrimination on any of the enumerated grounds under art. 26. Even accepting that the plaintiff was denied promotion or study leave (which they deny in any event), they submit that it is clear such acts do not and cannot amount to breaches of any fundamental rights.

[50] The defendants submit further that the constitutional claims should also be struck out on the grounds that they are an abuse of process, relying on the proviso to art. 28(2), which is preclusive of constitutional relief where adequate alternate remedies exist (see *Attorney General of Trinidad and Tobago v. Ramanoop* [2005] UKPC 15 [at para. 25]).

[51] They also contend that the statement of claim violates all of the other limbs of Ord. 18, r. 19. For example, they point out that the statement of claim is 46 paragraphs, 11 pages in length and contains a prayer for some 15 reliefs, which they say is vexatious, embarrassing and frivolous. In this regard, they refer to the Supreme Court case of *Mitchell et. al. v Finance*

Corporation of the Bahamas Ltd. et. al. [CLE/gen/1189 of 2009], in which the statement of claim was 316 paras, ran to 60 pages and the prayer was 116 paragraphs. In that case, M. Evans J. struck out the plaintiffs statement of claim, holding in part that the statement "…*in its entirely is embarrassing both from the excessive length at which statements of necessary facts are set out and from the statements of unnecessary facts*." Hepburn J. had struck out an earlier version of the statement of claim on the grounds that it "*offends practically every rule of pleading*". What was before Evans J. was a redux of that statement of claim, after the appeal from Hepburn's J. decision had been dismissed by the Court of Appeal.

[52] The plaintiff also asserts that the pleadings are embarrassing and will delay the action, as there are multiple pleadings (namely paragraphs 14, 15, 16, 17(a) 18 and 21-31) that are irrelevant, unnecessary and convoluted. Finally, they argue that the claims are statute barred and request the court to dismiss them on the basis of the limitation defence. The defendants also take the point that the statement of claim fails to plead any time period for the alleged breaches, which they say is wholly deficient: *Cartledge and others v Jopling & Sons Ltd.* [1963] AC 758, where the court affirmed the principle that the plaintiff bears the burden of proving that his cause of action accrued within the relevant limitation period.

The plaintiff's arguments

[53] Unsurprisingly, the plaintiff contends that the statement of claim discloses several causes of action and breaches of her constitutional rights. The plaintiff accepts that there are grammatical and stylistic errors, but contends that these may be corrected and argues that this is a case where the court should exercise its discretion not to strike out and allow "….*the factual dispute and points of law to be fully examined at trial."* In this regard, she cites a line of local cases in which the Bahamian courts have exercised their discretion not to strike out, in deference to the principle that the strike-out remedy is only intended for cases where the cause of action is "*obviously bad and almost incontestably bad*" (see, *Dyson v Attorney General,* [1911] 1 K.B. 410, quoted with approval by Gonsalves-Sabola J. in *Treasurer of the Commonwealth of the Bahamas v. Rolle Estate* [1985] BHS J.; and *Shamon Rodgers v. Bahamasair Holdings Limited* [2021] 1 BHS J. No. 70). She contends that her action and statement of claim amounts to a reasonable cause of action that has some chance of success and which merits a full hearing by a judge.

[54] The plaintiff also argues in her written submissions that the defendants' filing of a defence and denial of her claims confirms that the defendants "…*understand very well what the plaintiff is alleging because they are giving evidence refuting her claims*." In other words, she contends that it is inconsistent for the defendants to assert that the pleadings disclose no cause of action, but yet to plead to the claims by denying the allegations and/or positively pleading, for example, that the plaintiff has no constitutional or contractual right to study leave or promotion.

[55] The plaintiff rejects the defendants' contention that the pleadings are scandalous, frivolous or vexatious, relying on the principle in *Attorney-General of the Duchy of Lancaster v. London and North Western Railway Company* [1892] 3 Ch. 274, where Lindley LJ said that the "…*object of the rule is to stop cases which ought not to be launched—cases which are obviously frivolous or vexatious, or obviously unsustainable*…". This is not such a case, she says. Furthermore, it is contended that neither is the claim an abuse of process, since it discloses outstanding matters which ought to be litigated and the plaintiff contends there is "*no other mechanism available to the plaintiff to see justice*."

[56] As to the allegation of the pleadings being embarrassing or delaying a fair trial, the plaintiff contends that deficiencies in the pleadings do not prevent the matter from being dealt with fairly (*Berdan v. Greenwood and Another* (1878) 3 Ex. D. 251), since the defendants "are uniquely positioned" to defend themselves, as they have access to all of the records. Further, the plaintiff contends that the strike-out application was not make promptly: *BE Holdings Ltd. v. Piao Lianji* [2014] CLE/gen/01472.

[57] On the point of limitation, the plaintiff submits that the statement of claim discloses that the plaintiff did not "*have knowledge of these alleged acts*" (apparently the breaches) until the year 2013, and that she brought the action as soon as she became aware of the breaches. It is also argued that the defendants engaged in a pattern of discriminatory behavior that persisted for 17 years, in other words, that these were continuing breaches.

ANALYSIS AND DISCUSSION

[58] Before setting out my reasons for striking out the statement of claim, it is necessary to say something about the purpose of pleadings. In this regard, Teare J.'s analysis of the purpose of pleadings in *Towler v. Wills* [2010] EWHC 1209 is instructive:

> "18. The purpose of a pleading or statement of case is to inform the other party what the case is that is being brought against him. It is necessary that the other party understands the case so that he may plead to it in his response, disclose those of his documents which are relevant to that case and prepare witness statements which support his defence. If the case which is brought against him is vague or incoherent he will not, or may not, be able to do any of those things. Time and costs will or may, be wasted if the defendant seeks to respond to a vague and incoherent case. It is also necessary for the Court to understand the case which is being brought so that it may fairly and expeditiously decide the case and in a manner which saves unnecessary expense. For these reasons it is necessary that a party's pleaded case is a concise and clear statement of the facts on which he relies;…".

[59] In *Alpha Aviation Limited et al v Randy Larry Butler et al (2021/CLE/gen/01128, unrept., Supreme Court)* I said the following about the requirements of pleadings (paras. 23 and 24):

> "[23] Order 18, r. 6(1) requires a plaintiff to plead the material facts relied on for his claim, although not the evidence required to prove the alleged facts. It provides in material part as follows:
>
> > "[E]very pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits."
>
> As to what facts are material, in *Bruce v Odhams Press Ltd*., [1936] 1 KB 697 [at pg. 712], Scott LJ said:
>
> > "The cardinal provision in r. 4 is that the statement of claim must state the material facts. The word 'material' means necessary for the purpose of formulating a complete cause of action, and if any one 'material' fact is omitted, the statement of claim is bad; it is "demurrable" in the old

> phraseology, and in the new is liable to be "struck out" under Order 8 XXV., r. 4; see *Phillips v Phillips*; or "a further and better statement of claim" maybe ordered under Order XIX., r. 7."
>
> [24] This rule imposes a general obligation on a claimant to plead to his case with sufficient clarity and particularity so that his opponent is not taken by surprise and knows exactly the case he has to meet at trial (see, e.g., *Spedding v. Fitzpatrick* (1888) 38 Ch. D. 410, CA; *Bruce v Odhams Press Ltd*. (supra). But it does not require him to overload his statement with exhaustive particulars or minor details. The SOC should contain a concise statement of the facts on which the claimant relies to frame his cause of action, but other details are left to be supplied at later stages in the case, such as by the submission of witness statements and through the use of the processes of discovery and disclosure."

Causes of action

[60] I accept the defendants' submissions that the plaintiff has not pleaded any causes of action fit for trial. The plaintiff might feel aggrieved at what she says is the treatment meted out to her by the Police Force and the other defendants, and it might be that there are matters there that might form the basis for a legal claim. But, as set out further below, they are not pleaded, or properly pleaded, in the statement of claim.

Negligence

[61] In *Rahming v. The Mail Boat Company Ltd.* [BS 2015] CA 142, the Court of Appeal reiterated the well-known elements of a cause of action in negligence as follows [para. 68]: *"…it is common ground that to prove the claim of negligence the appellant must show that she was owed a duty of care by the respondent, that the respondent was in breach of that duty, and that the breach caused the accident and injury."* Although the claim purports to cite myriad particulars of negligence in respect of the first to eight defendants, it does not plead any facts or matters which are said to give rise to a duty of care by any of the defendants. Nor is there any pleading as to how any relevant duty of care was breached and how such breaches led to and damages being sustained by the plaintiff. These are material facts in pleading negligence, and the cause of action is therefore deficient.

Contract

[62] The pleadings in respect of an alleged breach of contract are, unfortunately, no clearer. In actions founded on contract, the nature of the contract (whether oral, expressed, or under seal), the terms of the contract which are said to have been breached (whether expressed or implied) as well as the matters which are said to constitute the breach must be set out with some particularity. That was not done here. As made plain from the extracts of the pleadings set out above, the nearest one gets to a pleading of any contractual terms is the reference to an alleged breach of the implied contractual term of "mutual trust and confidence" by the fifth and sixth defendants.

[63] To be successful on a claim for breach of the implied term of mutual trust and confidence, a plaintiff has to plead and establish that: (a) there was conduct which seriously destroyed or seriously damaged trust and confidence between employer and employee; and (b) the employer's conduct was done without reasonable and proper cause (*Malik v BCCI* [1997]

UKHL 23). To begin with, there is no clear account of the conduct relied on to found the breach and, as appears from the pleadings, the particulars of the breach of contract relied on amounts to a nebulous claim of discrimination on the grounds of sex. Further, there is no allegation that the employer acted without reasonable or probable cause, and therefore no factual basis in the pleadings to resist a defence that the conduct of the employer was reasonable and justified.

[64] There are other dimensions of the contractual claim which make it deficient and unsustainable. As mentioned, the breach of contract is alleged against *all* of the defendants, yet the plaintiff only pleads a relationship of mutual trust and confidence with the fifth and sixth defendants. Furthermore, it is common ground that the plaintiff was a police officer, and it is pleaded in her statement that she remained engaged with the Force until her discharge. To be sure, the fifth defendant (the Ministry of National Security) and the sixth defendant (the Department of the Public Service) may, respectively, have held general administrative oversight of persons employed within the uniformed branches and in the wider public service. But the court can take judicial notice of the fact that as a police officer she would have been enlisted with and/or engaged on a contractual basis with the Fourth Defendant (the Royal Bahamas Police Force), as represented by the Commissioner of Police.

[65] If the foregoing matters were not enough to torpedo this action, there are other matters which militate against a finding of any viable pleading of a breach of the implied term of mutual trust and confidence. Firstly, breach of the implied term of mutual trust and confidence is a repudiatory breach of the employment contract. This is why the claim most often arises in the context of claims for constructive dismissal. The plaintiff did not resign as a result of the alleged breaches, which she claims started from the 1990's, and which she averred continued during the course of her employment for nearly two decades. There is nothing in the pleadings to suggest anything otherwise than that the plaintiff must be taken to have affirmed the contract. There is also the question as to whether damages can be recovered for losses said to be attributable to a breach of the trust and confidence terms of the contract where the employee later leaves of his own volition, except in the rare cases where it is alleged that the breach caused continuing adverse financial effects for the plaintiff (*Malik, supra*). No allegations have been made of any adverse effects subsequent to the plaintiff's discharge from office.

[66] In all the circumstances, I do not find that the pleadings disclose a legally recognizable claim for breach of contract and, in any event, such facts are as set out cannot amount in law to breach of the implied term of mutual trust and confidence.

Constitutional claims

[67] It is plain that the constitutional claims suffer from lack of particularization of the alleged breaches and any supporting factual allegations. It is never disclosed what right the plaintiff claims is protected under art. 15 that has been violated. In any event, the law is settled, at least for those Caribbean countries that subscribe to the Privy Council as the apex court, that art. 15 in the Bahamian constitution and those with similar enacting formulae, contains only a preambular statement of subsequently conferred rights which are not justiciable (see, *Newbold and Ors. v. Commissioner of Police and Ors*. [2014] UKPC 12; *cf. Nervais v The Queen and Severin v. The Queen* [2019] CCJ 19 (AJ)].

[68] There are no allegations in respect of any inhuman treatment suffered by the plaintiff (art. 17(1)), nor of any arrest or detention to which she was subjected, and these must be rejected out of hand. As indicated, there are generalized allegations of discrimination under the contractual claim, but no specific pleadings of how the plaintiff's constitutional right not to be discriminated against was breached. The remit of the constitutional claim to discrimination is limited to different treatment based specifically on '*race, place of origin, political opinions, colour or creed*' and discrimination on some other ground will not found a constitutional claim (see, the West Indian case of *Nielsen v Barker* [1982] WIR 252 (at pg. 280), interpreting art. 149 of the Guyanese constitution, which is identical to art. 26 (3) of the Bahamian constitution).

[69] I therefore find that none of these constitutional grounds is properly pleaded or made out and they must be struck out.

Breach of statutory duty

[70] This claim is not developed beyond the generic assertion that the fifth and sixth defendants "*failed to take reasonable care of the Plaintiff welfare at work contrary to s. 4(1) of the Health and Safety Act*". Section 4(1) of that Act provides in substance that "*It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees*." Section 2 then sets out a number of matters to which this duty extends ("a-e"), which do not detract from the general duty under sub-section 1, but which primarily relate to protecting physical safety and health.

[71] In any event, it is to be noted that "employer" is a defined term and, while it includes a public authority, it is defined by reference to an entity which "*employs any person to work under a contract of employment*". However, the plaintiff never sets out any contractual relationship with the fifth and sixth defendants. Further, the plaintiff does not identify any specific duty either under any of the enumerated heads or the general duty which are said to have been breached and the matters relied on for their breach, which is necessary for pleading a breach of statutory duty. In fact, apart from a generic allegation that the plaintiff suffered "stress", there is no allegation that the plaintiff was exposed to any risk that hampered her health and safety at work. In any event, it should be clearly apparent that the purpose of the Act is primarily to protect against physical or mental injury in the work environment, and not meant to provide any alternative grounds for claims either in contract or tort, even if some of the statutory duties overlap with duties owed in tort.

Breach of common law duties

[72] This claim can be given very short shrift, as it is only a duplication of the particulars of negligence which are levied against the sixth defendant, and do not constitute an independent head of challenge separate from the negligence claim.

Scandalous, frivolous, vexatious and abuse of process

[73] I also consider that the statement of claim is frivolous and vexatious, in that the causes of actions which it purports to advance are unsustainable. As indicated, the plaintiff might feel that she has been wronged as a result of the treatment she allegedly received during the course of her employment and genuinely believes there are the makings of some legal claim there. But even if conceptually there is a cause of action, it has not been articulated in the pleadings.

The limitation defences

[74] Further, the defendants have pleaded the special limitation defence (at para. 26 of their defence) that the action is statute barred pursuant to section 12 of the Limitation Act, a prayer also made in the affidavit of Kirk Mackey (para. 24). While the law is clear that a limitation point does not constitute grounds to strike out as disclosing no cause of action, the same may be struck out either on the grounds that it is frivolous and vexatious and/or constitutes an abuse of process. In this regard, the defendants rely on the well-known authority of *Ronex Properties Ltd. v John Laing Construction and others* [1983] QB 298 where Stephenson LJ stated (pg. 408):

> "There are many cases in which the expiry of the limitation period makes it a waste of time and money to let a plaintiff go on with his action. But in those cases is may be impossible to say he has no reasonable cause of action. The right course is therefore to apply to strike out the plaintiff's claim, as frivolous and vexatious and an abuse of the process of the court, on the ground that it is statute-barred."

[75] In material part, s. 12 provides a limitation defence in respect of actions commenced against any person for any act done in pursuance or execution or intended execution of any written law or public duty, or any public authority in respect of any default or neglect in the execution of such law, duty or authority. In other words, it is a special limitation defence only available to public authorities or persons acting pursuant to law. As mentioned, the primary defendants are the Commissioner of Police, Ministry of National Security, and the Department of the Public Service. The defendants did not make out a specific case that the character of the defendants would engage the special limitation defence but it is plain that all the defendants are public authorities or persons sued in respect of their public or statutory functions. For example, and by way of analogy, in the Privy Council case of *Alves v Attorney General of the Virgin Islands* [2017] UKPC 42, the Board held that nurses employed in a public hospital came within the protection of the public authority limitation: "*The government is plainly a public body, and it can only have been exercising a public power or duty (in the broadest sense of public function) in employing nurses to work in a public hospital*."

[76] As to the limitation period, the defendants assert that the burden is on the plaintiff to prove that her cause of action accrued within the statutory period when a limitation defence is pleaded. The defence was filed 30 July 2021 and the affidavit of Kirk Mackey was filed 19 August 2021, both of which raised the limitation defence. The plaintiff did not file any responsive affidavits or a reply to the defence, notwithstanding that the court specifically gave leave for that purpose.

[77] The defendants further submitted that the plaintiff's claim is wholly deficient with respect to pleading any specific dates or time periods for the allegations. In fact, the only dates given are that the plaintiff was employed as a police officer from 22 August 1989, and in relation to the alleged breaches relating to her application for study leave and/or promotion it is only averred that these actions began "*In the early 1900*". Admittedly, this was a slip of the pen, and it was no doubt intended to state "1990's". But this slip of the pen only serves to highlight the failure to plead the time periods with any specificity.

[78] The plaintiff attempts to get around the limitation defence with several arguments. The first is that several of the claims are constitutional breaches and it is asserted, without more, that they "*must be addressed*." This contention was not elaborated on, but the clear implication is that constitutional rights are not subject to the specific limitation periods. I accept that the limitation periods, whether general or special, do not necessarily apply to constitutional applications (see *Edwards v. The Attorney General* [2008] CCJ 10 (AJ)); *Durity v Attorney General* [2003] 1 LRC 210, PC).

[79] But, as pointed out in the *Glinton & Esfakis* case (*supra*), constitutional actions are not immune to the court's strike-out jurisdiction. Furthermore, the lack of specific or inflexible time limits for initiating constitutional actions does not oust the inherent jurisdiction of the court to dismiss such actions for abuse of process. In *Durity*, the Privy Council emphatically rejected the argument by the Attorney-General that the applicant's claim for various declarations that his suspension as a magistrate contravened the provisions of the constitution was statute-barred by the provisions of the Public Authorities Protection Act, which imposed a one-year limit for bringing actions against public authorities. However, their Lordships made some general observations as to the court's strike-out powers in constitutional actions as follows:

> "[35]…When a court is exercising its jurisdiction under s. 14 of the Constitution and has to consider whether there has been delay such as would render the proceedings an abuse of process or would disentitle the claimant to relief, it will usually be important to consider whether the impugned decision or conduct was susceptible of adequate redress by a timely application to the court under its ordinary, non-constitutional jurisdiction. If it was, and if such an application was not made and would now be out of time, then, failing a cogent explanation the court may readily conclude that the claimant's constitutional motion is a misuse of the court's constitutional jurisdiction. This principle is well established. On this it is sufficient to refer to the much repeated cautionary words of Lord Diplock in *Harrikissoon v A-G* (1979) 31 WIR 348 at 349. An application made under s. 14 solely for the purpose of avoiding the need to apply in the normal way for the appropriate judicial remedy for unlawful administrative action is an abuse of process.
>
> [36]...In the present case Sinanan J held this was the position regarding Mr. Durity's application for constitutional relief in respect of the commission's decision to suspend him from office. The commission made this decision in August 1989. It was over five years later that Mr. Durity first sought to challenge this decision. As already noted, the Court of Appeal refused an application by Mr. Durity to amend his judicial review proceedings to introduce such a challenge. Given the lapse of time and absence of explanation, that decision by the Court of Appeal was plainly correct."

[80] The plaintiff contends further that she did not have knowledge of the alleged acts until the year 2013, which is astounding, since the main complaints are in respect of refusal of study leave and denial of promotion, which actions the plaintiff says took place from the early 1990's. Lastly, the plaintiff contends that she was subjected to a pattern of discriminatory behavior which she says persisted for over 17 years. I have already indicated that, based on the plaintiff's pleaded facts, it would appear that she affirmed the contract in the face of what would ordinarily be repudiatory breaches, and therefore these cannot be said to be continuing breaches.

[81] Taking all of these issues into consideration, I would strike out the common law and statutory claims on the grounds that they are either frivolous, vexatious or an abuse of process. In any event, I do not see how the plaintiff is able to answer the limitation defence. As indicated, the

pleadings allege that the breaches took place in the 1990's, and would be hopelessly out of time for a writ filed in December 2016. Indeed, the defendants may be thought less than vigilant for not also invoking the general limitation defences. Without any pleadings of specific dates for alleged acts of negligence and breach of contract, whose only reference are to the 1990's, the claim would clearly be out of time even in respect of the 3-year period for torts and personal injuries (including breach of duty) and the 6-year period for breach of contract.

Abuse of process (general principles)

[82] I have already come to the conclusion that the constitutional claims do not disclose any cause of action and would strike them out on that basis. But I would also hold that they constitute an abuse of process, not only because of the inordinate delay in the institution of the claim, for which no cogent explanation has been given, but also as an attempt to evade the proviso to article 28(3). That article precludes filing of constitutional actions where ordinary action is available (see *Durity, supra*, citing the well-known authority of *Harrikisson v Attorney General)* (1979) 31 WIR 348).

[83] The defendants further alleged that the pleadings are an abuse of process in that the plaintiff brought an action before the court for breach of contract and relied on similar facts pleaded in another action (*PUB/JRV/0007 of 2013*), in which Charles J. found that the plaintiff was entitled to pension in the amount of $11,193.58 (with interest) from the date of her retirement (11 September 2011). The plaintiff disputes that the claim is the same. I was provided with a copy of the claim in the judicial review action, and it appears that that claim was directed to the pension issues, and not the broad ranges of issues taken in this action. There is, however, a pleading in the instant action under the particulars of negligence of the third defendant of "*Intentionally or deliberately withholding pension, gratuity, 7/8 increment, back pay*…". This paragraph would obviously replicate the matters ligated in the judicial review action, and would be abusive. But I do not find that this claim replicates the claims decided in that matter so as to constitute an abuse of process on that ground.

Otherwise embarrassing

[84] The defendants argue that the statement of claim is "*embarrassing in its excessive form*", pointing out that it runs to some 11 pages, etc., and arguing by analogy the *Mitchell* case, which ran to 60 pages. As held in *Mitchell*, applying the well-known decision in *Davey v Garrett* (*supra*) a pleading may be prolix both as a result of unnecessary length and on the grounds that it contains irrelevant and deficient pleadings. I do not accept that the statement of claim is embarrassing simply as a factor of length, but I do find that the pleadings are embarrassing in that they contain vague and incoherent statements which would leave the defendants in considerable doubt as to the case they have to meet, and the court unsure of the issues it has to decide.

[85] The writ and statement of claim transgress virtually all of the rules and conventions of pleadings, and it does not require any painstaking analysis of the pleading to come to this conclusion. Overall, the statement of claim is trot out in a most usual form and structure. The pleadings are discursive, disjointed, confusing and difficult to unravel. They completely betray and subvert the basic requirement for pleadings to contain a concise statement of the facts giving rise to a cause of action to enable the defendants to have a clear understanding of the

case they have to meet and to enable the court to readily understand and adjudicate the issues. Take the following bird's-eye-view of the statement of claim:

(i) The introductory averments (paras. 1-20) do not assert with any degree of clarity (or at all) the nature of the relationships between the plaintiff and the multiple defendants that would give rise to any liability, or of the relationship between the defendants which are said to give rise to vicarious liability (for example, it is averred that the 1-4 plaintiffs are servants, employees and agents of the fifth and sixth defendant, without any explanation as to how such a relationship arises, or could possibly arise).

(ii) Paras. 21-36 plead multiple particulars of negligence against eight of the defendants (with the exception of the Attorney General), but fails to set out the facts and matters or the basis on which it is alleged that the defendants owed the plaintiff a duty of care.

(iii) Paras. 37-38 pleads "particulars" of breach of statutory duty in respect of the fifth and sixth defendants but fails to plead the particular statutory duty said to have been breached, or the ways in which it is alleged the fifth and sixth defendants were in breach of that duty.

(iv) Paras. 39-40 plead "particulars" of breach of common law by the fifth and sixth defendants, but there is no allegation of how these so-called duties were breached or how the plaintiff is alleged to have suffered any loss or damage as a result. They are also duplicative of the particulars of negligence alleged against the sixth defendant.

(v) Paras. 41-42 pleads "particulars" of breach of contract (incidentally against all of the defendants) without pleading the details of any contractual relationship. Moreover, the facts giving rise to the breach are said to be caused by "discrimination" (actually one of the constitutional claims) against the plaintiff.

(vi) Paras. 43-44 plead particulars of "injury to feelings", presumably as a separate cause of action, when it is only an element of damages in a claim for aggravated damages for high-handed, malicious or oppressive conduct in committing some other tort or breach of duty.

(vii) Paras. 45-46 purports to plead constitutional breaches, without providing a scintilla of factual allegations to support the said breaches.

(viii) At para. 47, the plaintiff sets out a list of some 12 prayers for a mix of declaratory relief and various claims for damages. The claims to declarations 1 and 4 are misconceived, as being declarations only available in a public law claim since they are not specific to the plaintiff; the declaration sought at 2 and 3 are unintelligible. There are also claims for heads of damages which are either unavailable in law, or simply misconceived, for example, damages "*in addition to or in lieu of specific performance*", damages for breach of contract, and duplicative remedies sought in tort and contract based on the same factual allegations (see, for example, *Tai Hing Cotton Mill Ltd. v Liu Chong Hing Bank Ltd.* [1986] A.C. 80 [107].

Amendment

[86] The defendants also submit that the statement is incurably bad and is not capable of amendment. The plaintiff did submit that should the court consider the pleadings deficient, it should allow the plaintiff an opportunity to amend as an alternative to striking out, although no specific application was filed for this purpose. I would not have been inclined to grant leave

for amendment in any event, because I am unable to recognize a basis in the underlying factual matrix, even allowing for any evidence which might be produced based on the allegations, that the plaintiff will be able to sustain any of the alleged causes of action pleaded or answer the limitation defence.

[87] To allow amendment at this stage would also work a serious injustice to the defendants. The plaintiff hesitated for nearly three years before filing its statement of claim and was formally put on notice from as early as April 2019 when the first strike-out summons was filed that the defendants would be attacking her pleadings. This should have prompted any vigilant plaintiff, much less one who is also a lawyer, to review the pleadings and seek leave to amend at the earliest stage. It is now over 6 years since the statement was filed and the plaintiff is only now raising the issue of amendment. In my judgment, the pleadings are fundamentally flawed and cannot be repaired by amendment, no matter how substantive. I would not exercise my discretion to grant leave to amend.

Other matters

[88] In addition to the criticism made by the defendants, there are other serious transgressions of the rules of pleadings discerned on the face of the writ and statement of claim of which the court may take note. As mentioned, the only cause of action mentioned in the writ is breach of contract, and the rules clearly provide that the statement of claim may not be enlarged beyond the causes of action pleaded in the writ, or which arises from the same facts without amending the indorsement: RSC Ord. 18, r. 15(2); *Graff Bros Estates Ltd. v. Rimrose Brook Joint Sewerage Board* [1953] 2 QB 318. It is plain that the facts alleged in the statement of claim as giving rise to the other causes of action set out therein go way outside the factual parameters of what is pleaded in the writ in support of the claim for breach of contract. It was and is therefore impermissible for the plaintiff to have added in their statement of claim the further allegations relating to the additional causes of action without amending their writ. The defendants would have been entitled therefore to apply under Ord. 19, r. 19 to have the additional allegations struck out on this basis alone.

[89] Secondly, it is not possible to add a defendant to the action by simply writing them into the statement of claim. This can only be done on an application for leave to amend the writ to add a defendant or by the court of its own motion (Ord. 15, r. 6; Ord. 20, 4. 5).

CONCLUSION AND DISPOSITION

[90] In my judgment, for the reasons discussed, the defendants are right in their contentions that the pleadings in this action are wholly deficient and ought rightly to be struck out. I hereby order that the statement of claim be struck out in its entirety. Costs to be those of the defendants to be taxed if not agreed.

30 November 2023

Klein, J.